No. _____

In The

Supreme Court of the United States

October Term, 1992

FRANK LONGO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity
as Postmaster of the Torrington Post Office,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTHA STONE
(Counsel of Record)
Connecticut Civil Liberties
Union Foundation
32 Grand Street
Hartford, CT 06106
(203) 247-9823

MARTIN MARGULIES
Bridgeport School of Law
at Quinnipiac College
303 University Avenue
Bridgeport, CT 06604
(203) 576-4121

MATTHEW HOROWITZ
WEISELMAN, HOROWITZ & THAYER
241 Main Street
Hartford, CT 06106-1817
(203) 724-6667

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QUESTIONS PRESENTED

1. Whether United States Postal Service sidewalks, which connect post office parking lots to the main building, are designated public fora.

2. Whether United States Postal Service sidewalks, which connect post office parking lots to the main building, are traditional public fora.

3. Whether a content-based United States Postal Service regulation, which prohibits "campaigning for election to any public office" on postal service property, can survive the applicable standard of review.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Frank Longo respectfully requests that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of

Appeals for the Second Circuit on December 28, 1992.

OPINIONS BELOW

The December 28, 1992 opinion of the United States Court of Appeals for the Second Circuit is reported at 983 F.2d 9 (2d Cir. 1992) and is set forth in the Appendix to this Petition at 1A.

The January 13, 1992 opinion of the United States Court of Appeals for the Second Circuit is reported at 953 F.2d 790 (2d Cir. 1992) and is set forth in the Appendix to this Petition at 15A. The Order of the United States Court of Appeals for the Second Circuit, dated March 9, 1992, which denied Petitioner's Petition for Rehearing, is set forth in the Appendix to this Petition at 13A. The Order of the Supreme Court of the United States, vacating the Second Circuit's

judgment and remanding the case to the Second Circuit for further consideration, is set forth in the Appendix to this Petition at 12A.

The opinion of the United States District Court for the District of Connecticut, dated April 8, 1991, granting Petitioner's Motion for summary judgment is reported at 761 F.Supp. 220 (D.Conn. 1991) and is set forth in the Appendix to this Petition at 33A. The judgment issued by the District Court on April 9, 1991 is set forth in the Appendix to this Petition at 31A.

JURISDICTION

The United States Court of Appeals for the Second Circuit filed an opinion and entered a judgment on December 28, 1992. This petition for a writ of certiorari is taken from the December 28,

1992 opinion and judgment of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Section 221.654 of the Postal Service Manual, reported at 39 C.F.R. Section 232.1(h)(1), are set forth in the Appendix to this Petition at 106A.

STATEMENT OF THE CASE

This case presents forum-analysis issues which this Court addressed, but did not resolve, in U.S. v. Kokinda, 497 U.S. 720 (1990): namely, the forum status of United States Postal Service sidewalks - sidewalks, that is, that connect post office parking lots to the main building.

Neither were these issues resolved by this Court's subsequent decision in International Society for Krishna Consciousness v. Lee, 112 S.Ct. 2701 (1992).

The facts are simple. Petitioner Frank Longo, an anti-establishment Connecticut politician who has been, at various times, Mayor of Bristol, Connecticut and an unsuccessful candidate for Governor, attempted to run as an independent for the United States Senate in the 1988 election. In order to collect the signatures he needed to appear on the ballot, he campaigned, as he had done in the past, outside United States post offices. He viewed post offices as especially useful places for signature-gathering because they attract large

numbers of literate patrons -- patrons, moreover, who are not encumbered by bulky items (as they might be at airports or shopping centers) and who are therefore likely to be receptive to political appeals. See Affidavit of Frank Longo, August 12, 1988, set forth in the Appendix to this Petition at 85A. His practice was to seat himself at a tiny, non-intrusive table on the sidewalk adjacent to the office and offer petitions to passers-by. At most locations he met with no objection, but the Torrington, Connecticut postmaster ordered him to leave, citing Postal Service regulation 39 C.F.R. Section 232.1(h)(1), a portion of which prohibits "campaigning for election to any public office" on post office property. When Longo refused, he was arrested. The charge was later dismissed, and Longo

resumed his campaigning, but by then it was too late for him to collect the required signatures. Wishing to run, as an independent, for statewide office in the future, and hoping to use post office sidewalks for signature-gathering purposes, he brought this lawsuit.

PROCEEDINGS BELOW

Petitioner filed suit in August, 1989 in the United States District Court, District of Connecticut. He named, as defendants, the United States Postal Service and Torrington, Connecticut postmaster Alden Victoria. The suit, seeking declaratory and injunctive relief and attorneys' fees, was commenced pursuant to 42 U.S.C. Section 1983. It alleged that United States Postal Service Regulation 39 C.F.R. 232.1(h)(1), to the extent that it prohibited campaigning for

office, was invalid, both facially and as applied, under the First Amendment to the United States Constitution.

In April, 1991, the district court granted summary judgment in Longo's favor. It found that the Torrington post office sidewalk was a non-forum, but concluded that the challenged regulation failed rational basis review because it was content-based and grossly underinclusive. 761 F.Supp. at 229-233. Appendix, at 64A-79A. An appeal was taken to the United States Court of Appeals for the Second Circuit. On January 13, 1992 that court reversed the district court's judgment. Declining to categorize the forum, the Second Circuit found instead that the "no-campaigning" rule, though based on subject-matter, was a content-neutral time, place and manner regulation that

could survive scrutiny in any type of forum. 953 F.2d at 794. Appendix, at 22A. The court denied Longo's petition for rehearing, and suggestion for rehearing in banc, on March 9, 1992. Appendix, at 13A.

Barely two months later, however, this Court held -- with the agreement of all eight of the participating Justices -- that a nigh-identical "no campaigning" rule, forbidding campaigning outside polling places on election day, was content-based. Burson v. Freeman, 112 S.Ct. 1846 (1992). Accordingly, on October 5, 1992, this Court vacated the Second Circuit's judgment in Longo and remanded the case to the Second Circuit for further consideration in light of Burson. Appendix at 12A. On December 28, 1992, without hearing oral argument, the

Second Circuit issued a brief opinion adhering to its former judgment, on the ground that the Torrington, Connecticut postal service sidewalk was a nonpublic forum, and the "no-campaigning" rule satisfied the applicable rational basis standard of review.

The petitioner believes that the Second Circuit erred in characterizing the Torrington sidewalk as a nonpublic forum. In refusing to acknowledge that postal service sidewalks, including Torrington's, are at least designated public fora, the Second Circuit's opinion reflects the confusion that has beset the Circuits since the question first arose in the early 1980s. And, in refusing to categorize such sidewalks as traditional public fora, the Second Circuit widened the breach between the Circuits that

already existed when this Court rendered its plurality decision in Kokinda.[1]

Neither Kokinda nor Lee has dispelled the confusion over the designated forum issue. What is more, these decisions did not resolve the conflict over the sidewalks' traditional forum status. Kokinda did not do so, because no single theory of forum analysis, in that case, commanded a majority. And Lee did not do so, both because it is not necessarily this Court's last word on the subject, and because it is in any event distinguishable. Finally, even if postal service sidewalks are nonpublic fora, the

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[1] Compare, e.g., U.S. v. Kokinda, 866 F.2d 699 (4th Cir. 1989), rev'd, 497 U.S. 720 (1990) (post office sidewalks are traditional fora) with U.S. v. Belsky, 799 F.2d 1485, 1489 (11th Cir. 1986) and Monterey County Democratic Cent. Comm. v. United States Postal Serv., 812 F.2d 1194 (9th Cir. 1987).

Second Circuit's extremely deferential version of rational basis review does not comport with the rational basis standard applied in this Court's prior rulings, including Lee. For all of these reasons, and indeed for any one of them, this Court should grant certiorari review.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S REFUSAL TO CHARACTERIZE THE TORRINGTON POST OFFICE SIDEWALK AS A DESIGNATED PUBLIC FORUM REFLECTS CONFUSION RESULTING FROM THE FACT THAT THIS IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

On October 5, 1992, this Court granted certiorari in the case of Lamb's Chapel v. Center Moriches Union Free School District, 959 F.2d 381 (2d Cir. 1992). 113 S.Ct. 51 (1992). Lamb's Chapel, presumably, will resolve the conflict among the Circuits as to whether

the government, once having created a designated forum for the discussion of a wide range of subjects, may prohibit the discussion of particular subjects without satisfying strict scrutiny.[2] But Lamb's Chapel will not resolve - for the question is not presented - the critical threshold issue of whether the government has created a designated forum in the first place.[3]

This question is squarely presented by the case at bar. Unlike the school district in Lamb's Chapel, the postal

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[2] In Lamb's Chapel, a school district had made school buildings available to community groups, after hours, for virtually all speech uses except religious ones.

[3] In Lamb's Chapel, the school district, by explicit invitation, had opened the premises to a wide variety of named speech uses, so that the "designation" is not in doubt. 959 F.2d at 386.

service has not announced in so many words, by regulation or other stated policy, that postal service premises are open for the discussion of a broad range of topics. Most assuredly, however, it has opened the premises by negative implication. The "no-campaigning" rule constitutes the only subject-matter-based exclusion of "core" speech from post office property.[4] Nothing prevents the petitioner or others from using post office sidewalks, singly or in groups, to discuss politics, art, or - in contrast to Lamb's Chapel - religion, provided that the speech activities do not cause "obstruc[ion]" or make "loud or unusual

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[4] The only other speech uses forbidden by the regulation are commercial advertising and solicitation of money.

noise."[5] The record, moreover, contains ample evidence of such uses. See Affidavit of Lynn Taborsak, August 17, 1989, set forth in the Appendix to this Petition at 80A.

The petitioner recognizes, of course, that the "government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). Thus, non-forum property is not transformed into a designated public forum merely because the government agency in charge of the property promulgates no formal rule

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[5] 39 C.F.R. Section 232.1(e), cited in the District Court opinion, 761 F.Supp. at 232-233, n.23.

prohibiting all or most forms of expression. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983). Nor does the property become a designated public forum merely by virtue of a "rule" that gives the agency discretion to decide, on a case by case basis, who may and may not speak; such a rule, on the contrary, evinces the agency's determination to retain control over speech activities on the premises. Greer v. Spock, 424 U.S. 828 (1976). In either instance, as Perry and Greer make clear, the property retains its non-forum character even if occasional speech uses do occur. In Longo, however, the postal service has consciously, deliberately and expressly fashioned a speech policy. The policy consists of a non-discretionary regulation which forbids certain types of

speech - few in number - while countenancing all others. According to the plain meaning of the language that the regulation employs, the Postal Service has thereby intentionally invited the discussion of all subjects that are not barred.[6] Let it be supposed, for example, that the Postal Service had worded the regulation differently - without changing its substance - by explicitly authorizing public discussion pertaining to politics (other than campaigning for office), religion, art, science, philosophy and recreation, while omitting to authorize partisan campaigning, fund-raising, and commercial advertising. Surely no-one, including the respondents, would deny that

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[6] Cf. United States v. Alvarez-Machain, 119 L.Ed.2d 441, 453 (1992) (per Rehnquist, C. J.) (a treaty that does not prohibit kidnapping implicitly allows it).

the Postal Service had created a designated public forum, at least as to the named subjects. Lamb's Chapel, 959 F.2d at 387. Instead of being formulated in this fashion, the postal regulation in the instant case, though saying the same thing, is written in reverse: it prohibits campaigning for office, fund-raising and commercial advertising, but not the discussion of other topics. Based on this wholly semantic difference, the respondent has argued, and the Second Circuit has evidently agreed, that no "designation" has occurred. The distinction is simply too formalistic to be maintained.[7]

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[7] In the breadth of its invitation to speech activity, the postal service differs dramatically from the airport terminal in Lee, where no designated forum was found. In Lee, the terminal had barred leafletting, which is a major -

It would not be accurate to say that the Circuits are split on the issue of how a designated forum comes into being. But it is accurate to say that the decisions reflect uncertainty and confusion.[8] Jacobsen v. United States Postal Service, 1992 WL 152116 (9th Cir. July 7, 1992) (citing Monterey, supra), Belsky, supra, and Longo itself have all held that post office interior sidewalks are nonpublic fora (though significantly, Jacobsen noted

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perhaps the major - vehicle of interactive public speech. The postal service, in contrast, countenances nigh-limitless leafletting, other than leafletting that involves campaigning for office, fund-raising, or commercial advertising.

[8] The confusion may date back to Perry, where this Court's majority opinion expressed doubt as to whether a faculty mailbox system was a nonpublic forum for all purposes, or had become a designated (albeit limited) forum for the handful of speech activities that school authorities had allowed. 460 U.S. at 48.

-- two years after Kokinda and several weeks after Lee -- that this Court "has yet to give a definitive answer" to the question. Slip Opinion at 8061).[9] But National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 722 -723 (7th Cir. 1984) and American Postal Workers Union, AFL-CIO v. United States Postal Service, 764 F.2d 858, 861 n.6 (D.C. Cir. 1985), cert. denied, 474 U.S. 1005 (1986) declined to decide whether the sidewalks are designated fora, and seemed - particularly Bolger - to acknowledge some puzzlement on the point. In U.S. v. Bjerke, 796 F.2d 643, 649-650 (3d Cir. 1986), the court concluded that sidewalks

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[9] So, too, did Longo. "[W]e are not necessarily bound by the Supreme Court's plurality opinion in United States v. Kokinda...." 983 F.2d at 11. Appendix, at 7A.

had not been designated as public fora for "all expressive purposes," or for purposes of "unlimited public expression (emphasis added)," but appeared to acknowledge that the postal service had (or may have) designated a forum for the discussion of those topics which the regulations did not forbid. Plainly, therefore, there is no clear consensus.

If, implausibly, the creation of a designated public forum requires the talismanic utterance of a formal invitation, then Longo, at least on this issue, was rightly decided. If, however, courts should look to the substance and not just to the form of the invitation (including actual patterns of use, see Taborsak affidavit, supra), then the Second Circuit committed grave error. In either event, this Court should provide

authoritative guidance, and should grant certiorari in order to do so.[10]

II. THE SECOND CIRCUIT'S ERRONEOUS REFUSAL TO CHARACTERIZE THE TORRINGTON POST OFFICE SIDEWALK AS A TRADITIONAL PUBLIC FORUM REFLECTS A CONFLICT AMONG THE CIRCUITS THAT NEITHER KOKINDA NOR LEE HAS DISPELLED.

This Court, in Kokinda, reversed the Fourth Circuit's judgment in that case (cited in footnote 1 of this petition). But since there was no majority opinion, Kokinda did not authoritatively reject the Fourth's Circuit's reasoning, which was

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[10] The petitioner recognizes that if Lamb's Chapel is decided in the government's favor, it will not much matter, to him, whether post office sidewalks are designated fora or not - for, even if they are, they would be "designated" only for the discussion of those topics that the government has chosen to allow. Given Lamb's Chapel's potentially dispositive impact on this one issue, the petitioner respectfully suggests that this Court may wish to delay its decision on his certiorari petition until that case is resolved.

that post office sidewalks are traditional public fora. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 n.9 (1988), citing Marks v. United States, 430 U.S. 188, 193 (1977). Thus, it is the petitioner's understanding that the Circuits remain divided as before.

The government will no doubt argue that Lee has erased the conflict, at least inferentially, in that Lee's finding that airport terminals are nonpublic fora should apply to post office sidewalks as well. That proposition, however, is by no means clear. Though Justice O'Connor provided a critical fifth vote on the forum categorization issue, her rational basis test was in fact significantly elevated, and in some respects approximated the standard more commonly

associated with public fora.[11] Given this circumstance - given the dearth of alternative fora now that downtown streets, sidewalks and parks are largely deserted, 112 S.Ct. at 2717 (Kennedy, J., concurring in the judgment) - and given the resulting marginalization of dissident voices that will necessarily occur if the government may place all other properties off-limits (id. at 2720, Kennedy, J., concurring), the petitioner urges this Court to re-examine Lee's forum-analysis.

Even if this Court is unwilling to do so, the facts of Longo are significantly different from Lee's, and call for a different outcome. Airport terminals (the

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[11] 112 S.Ct. at 2713-2715. Compare Reed v. Reed, 404 U.S. 71 (1971) (gender discrimination), in which heightened rational basis review proved a precursor to more formal elevated review in later decisions.

property at issue in Lee) are of relatively recent origin; therefore, according to Lee's majority, they cannot plausibly claim to be "traditional" vehicles for expression. Lee, 112 S.Ct. at 2706; id. at 2711 (O'Connor, J., concurring). Post offices, in contrast, predate the Republic. See United States Const. Art. I, section 8, cl. 7. The primary purpose of airport terminals is "the facilitation of passenger air travel, not the promotion of expression." Lee, 112 S.Ct. at 2707; see id. at 2711 (O'Connor, J., concurring). Post offices, in contrast, perform a quintessentially expressive function, as Justice Kennedy pointed out in his dispositive concurring opinion in Kokinda, 497 U.S. at 737. Unlike airport terminals, which serve a non-representative segment of the public,

Lee, 112 S.Ct. at 2704, post offices, as a matter of common knowledge, accommodate the sort of general audiences that used to assemble on Main Streets before Main Streets ceased to be centers of American public life.[12] Finally, airport terminals "are designed to be geographically isolated from other parts of the community" by a vast network of highways. International Society for Krishna Consciousness v. Lee, 925 F.2d at 585 (2d Cir. 1991) (Oakes, J., concurring). Post office sidewalks, on the other hand, typically stand - like Torrington's - close by the Main Streets that they have

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[12] Post office sidewalks, to be sure, lack the shops and restaurants that one associates with Main Streets. The presence or absence of these facilities, though, does not appear to be a factor, inasmuch as Lee's airport terminals contained shops and restaurants in abundance. 112 S.Ct. at 2704.

functionally displaced. Longo, 761 F.Supp. at 223. Appendix at 60A.

For all of these reasons, Lee does not control this case, and both the Ninth and the Second Circuits have implicitly acknowledged as much.[13] Accordingly, this Court should grant certiorari in order to consider Lee's impact on the traditional public forum question that this case presents.

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[13] Jacobsen does not rely upon Lee at all. Longo cites Lee, but apparently uses the case merely as one of the factors that induced the panel to "choose" to adopt Kokinda's plurality opinion. 983 F.2d at 11. Appendix at 7A.

III. EVEN IF THE TORRINGTON POST OFFICE SIDEWALK IS A NONPUBLIC FORUM, THE SECOND CIRCUIT'S VERSION OF RATIONAL BASIS REVIEW WAS EXCESSIVELY DEFERENTIAL, REFLECTING THE FACT THAT THIS COURT HAS NOT YET SETTLED THE IMPORTANT QUESTION OF JUST HOW DEFERENTIAL FIRST AMENDMENT RATIONAL BASIS REVIEW SHOULD BE.

Even if the Torrington post office sidewalk, and post office sidewalks in general, are nonpublic fora, the Second Circuit applied an excessively deferential version of rational basis review, in at least three respects.[14]

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[14] It is inconceivable that the no-campaigning rule could survive the strict scrutiny that is applicable to subject-matter-based regulations in traditional public fora and - depending upon the outcome in Lamb's Chapel - perhaps in designated public fora as well. The Second Circuit itself acknowledged that the government's interest is not compelling. 983 F.2d at 11. Appendix at 5A. And, even if the interest were compelling, there are numerous less speech-restrictive ways of attaining it, e.g. by posting a sign disclaiming official endorsement of speakers' views. PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980).

First: even Lee's majority opinion based its finding that the airport terminals' no-solicitation rule was reasonable upon the fact that, though the rule banished solicitation from the terminals' interiors, it allowed face-to-face solicitation on the terminal sidewalks outside the building - sidewalks that were frequented by 97% of the solicitors' desired audience. "[W]e think it would be odd to conclude," wrote the Court, "that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled." 112 S.Ct. at 2709. In Longo, however, the no-campaigning rule bans campaigning everywhere on the property and relegates the speakers to the surrounding municipal sidewalks, where they will be reduced to shouting their

message at cars turning into the post office parking lots. Since the Second Circuit nevertheless found this exclusion "reasonable," its "reasonableness" test manifestly contained less "bite" than the reasonableness test employed by Lee's majority.

Second: Justice O'Connor - replicating the approach taken by the district court in Longo, 761 F.Supp. at 231-233, Appendix at 70A-78A - deemed the terminals' no-leafletting rule unreasonable because it was underinclusive. "[I]t is difficult," she observed, "to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible" with the forum at issue. 112 S.Ct. at 2714. It is equally difficult to detect any differences, relevant to the government's

asserted interest in keeping the post office out of partisan politics, between campaigning for office and other forms of highly partisan political activity (e.g., gathering signatures for or against the right to abortion) that its regulation countenances. Justice O'Connor also noted that the Court - when sustaining a regulation that banned, from a military base, material that posed "'a clear danger to [military] loyalty, discipline, or morale,'" - had "'emphasized' that the regulation 'did not authorize the...authorities to prohibit the distribution of conventional political campaign literature.'" 112 S.Ct. at 2714, citing Greer v. Spock, 424 U.S. 828, 840 (1976). Such a rule, in her view, would be overinclusive -- and, if it would be overinclusive even at a military base,

presumably it would be even more so at a postal facility. By sustaining a rule that is both underinclusive and over-inclusive, the Second Circuit applied a reasonableness test that was significantly less rigorous than Justice O'Connor's.

Finally, and perhaps most importantly, this Court has never, in any of the post-Perry cases, sustained a speech-restrictive regulation, even in a nonpublic forum, unless the government's concerns were supported by the record. Cornelius, 473 U.S. at 810 (political advocacy groups could be excluded from a government fundraising program because "the record amply supports an inference" that the excluded groups would damage the program); Kokinda, 497 U.S. at 731-732, 735 (plurality opinion) (finding ample basis, in the record, for the government's

conclusion that in-person solicitation of money, at post offices, generated special harms that were not presented by other forms of expression).[15] Similarly, in Lee itself both the majority opinion and Justice O'Connor's concurrence dwelt in detail on the airports' well-documented congestion problems, and on the probable effect of solicitation activities in exacerbating those problems. 112 S.Ct. at 2708 (opinion of the Court) (see, especially, n.5 and text); id. at 2713 (opinion of Justice O'Connor). The present record, in contrast, provides no

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[15] In Perry, the government's concerns were more speculative, 460 U.S. at 52, n.12; hence, the uncertainty over just how much "bite" the rational basis standard actually contains. Similar uncertainty attaches to the meaning of rational basis review in the equal protection context. U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 176-177 n. 10 (1980).

support whatever for the proposition that the no-campaigning rule advances the political neutrality concerns which the government professes.

The record establishes this much: that Congress - when reorganizing the Postal Service in 1970 - wanted to put an end to the politicization of the institution that had occurred under its prior regime. H.R. Rep. No. 1104, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 3649, 3654, 3661, cited by the Second Circuit in Longo, 953 F.2d at 794-795, Appendix at 23A. But the politicization problems identified by Congress all relate to personnel matters, and, in particular, to the evils associated with politically appointed staff. The record points to no evils, or likely evils, arising from campaigning on

post office sidewalks by persons not employed in the Postal Service. The record does not even support an inference that Congress harbored any concerns about such evils. By sustaining a rule that finds no support in the record, the Second Circuit applied a reasonableness test that was far more deferential than either Cornelius, Kokinda, or Lee would seem to countenance.

This Court should grant certiorari to decide whether such a rule, supppрted only by chimerical, post hoc arguments, can satisfy even rational basis scrutiny in a nonpublic forum - for, if it can, so-called rational basis review becomes tantamount in practice to no review. So deferential a posture would not do justice to the important First Amendment values

that Mr. Longo, and other speakers, represent.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. The petitioner respectfully reiterates his suggestion that this Court defer action on his petition until Lamb's Chapel is decided.

Respectfully submitted,

Martha Stone
(Counsel of Record)
Connecticut Civil Liberties
Union Foundation
32 Grand Street
Hartford, CT 06106
(203) 247-9823

Martin Margulies
Bridgeport School of Law at
Quinnipiac College
303 University Avenue
Bridgeport, CT 06604
(203) 576-4121

Matthew Horowitz
Weiselman, Horowitz
and Thayer
241 Main Street
Hartford, CT 06106-1817
(203) 724-6667

No. _____

In The

Supreme Court of the United States

October Term, 1992

FRANK LONGO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity
as Postmaster of the Torrington Post Office,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 374 August Term 1991

(Submitted November 30, 1992)

Decided December 28, 1992

Docket No. 91-6141

FRANK LONGO

Appellee,

v.

UNITED STATES POSTAL SERVICE, et al.

Appellants

BEFORE: TIMBERS, WINTER and WALKER,
Circuit Judges

On remand from the Supreme Court for reconsideration of our prior opinion, 953 F.2d 790 (2 Cir. 1992), in light of Burson v. Freeman, 112 S. Ct. 1846 (1992), which held that prohibitions on political speech are not content-neutral, even if they are viewpoint-neutral.

Reversed.

Stuart M. Gerson, Assistant Attorney General, Douglas N. Letter and Steve Frank, Attorneys, Dept. of Justice, Gary E. Shapiro, Postal Service, Washington, D.C.; and Richard Palmer, United States Attorney, Bridgeport, CT, submitted a brief for appellants.

Martin Margulies, Matthew Horowitz, and Wieselman, Horowitz & Thayer, Bridgeport, CT, submitted a brief for appellee.

PER CURIAM:

On January 13, 1992, we entered a judgment and filed an opinion, 953 F.2d 790, which reversed a summary judgment entered April 8, 1991 in the District of Connecticut, Alan H. Nevas, District Judge, in an action entitled Longo v. United States Postal Service, 761 F. Supp. 220. The district court held unconstitutional a Postal Service Regulation which prohibited campaigning on Postal Service property. In reversing, we

held that the regulation was content-neutral and served a significant state interest.

On October 5, 1992, the Supreme Court entered an order granting certiorari, vacating the judgment of this Court, and remanded the case to this Court for further consideration in light of Burson v. Freeman, 112 S. Ct. 1846 (May 26, 1992).

We ordered counsel for the respective parties to file briefs addressed chiefly to the issue whether Burson controls in the instant case. Such briefs have been filed. We have carefully reconsidered as ordered by the Supreme Court.

For the reasons that follow, we adhere to our original decision and reverse the judgment of the district court.

I.

The facts in this case are not in dispute. They have been set forth clearly in both the district court opinion and our original opinion. We therefore need not fully restate them here. We summarize only those facts believed necessary to an understanding of the discreet issue now before us.

Appellee challenged the constitutionality of the Postal Regulation, 39 C.F.R. § 232.1 (h) (1) (1992), which prohibits campaigning on postal premises. The district court, in granting summary judgment in favor of appellee, held that, despite the fact that the postal walkway on which appellee was prohibited from campaigning is a nonpublic forum, the regulation was not reasonable.

On appeal, we found no need to determine whether the postal walkway was a nonpublic forum because we held that the regulation was a valid content-neutral restriction on the time, place, and manner of expressive activity. We held that there was a significant state interest in a regulation which enables the Postal Service to avoid actual entanglement in partisan politics and the appearance of political favoritism. 953 F.2d 790, 794.

II.

A facially content-based restriction on speech is subject to exacting scrutiny, requiring that the regulation be narrowly drawn to serve a compelling state interest. Burson, supra, 112 S.Ct at 1851; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). It is rare that a law survives such high scrutiny. Burson, supra, 112 S. Ct. at

1852 (the integrity of the electoral process is one of the rare compelling state interests). While we have held that the state's interest in enacting the regulation involved in the instant case may be significant, surviving the exacting scrutiny required for content-neutral time, place, and manner restrictions, we decline to hold that it is compelling.

There are grounds, however, on which we believe we should reverse the district court and uphold the validity of the regulation. If we hold that the postal walkway involved is a nonpublic forum, then the standard applied to determine the validity of the regulation is a "reasonableness" test. This was the focus of the opinion of the district court in this case, which held that the postal walkway was a nonpublic forum. Judge Nevas, therefore, applied a

"reasonableness" test to determine if the regulation ultimately was struck down by the district court because it was found to be unreasonable. Id. at 232.

Although we are not necessarily bound by the Supreme Court's plurality opinion in United States v. Kokinda, 497 U.S. 720 (1990), which held that a postal sidewalk which is used solely for passage of individuals engaged in postal business is a nonpublic forum, we choose to follow that analysis (which also has been the analysis used in several other circuits). Jacobsen v. United States Postal Service, 1992 WL 152116 (9 Cir. July 7, 1992) (adopting Kokinda's plurality opinion); see also Monterey County Democratic Cent. Comm v. United States Postal Service, 812 F.2d 1194 (9 Cir. 1987); United States v. Belsky, 799 F.2d 1485 (11 Cir. 1986); United States v. Bjerke, 796 F.2d 643 (3

Cir. 1986); American Postal Workers Union v. United States Postal Service, 764 F.2d 858 (D.C. Cir. 1985), cert. denied, 474 U.S. 1055 (1986). As in Kokinda, the interior postal walkway here involved, which was constructed solely for the purpose of assisting patrons of the post office to get from the parking lot to the front door of the post office, is a nonpublic forum. As the district court below stated, "The layout of the post office in Kokinda is virtually identical to the layout of the post office in Torrington, Connecticut at issue in the instant challenge...." 761 F.Supp. at 228. Both structures are freestanding buildings, separated from the public streets and sidewalks by interior postal walkways. While the main sidewalks are public passageways, the interior walkway is not.

As the Supreme Court stated in International Soc. for Krishna Consciousness v. Lee, 112 S. Ct. 2701 (1992), a public forum is not created whenever the public can freely visit an area owned or operated by the Government. Id. at 2706; Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985). This is particularly true if the area is separated from traditional public areas, indicating the existence of a separate enclave. Lee, supra, 112 S. Ct. at 2706.

Upon a finding that an area is a nonpublic forum, the only requirement of the regulation is that it be reasonable and not an effort to suppress a speaker because of a disagreement with that person's views. Lee, supra, 112 S. Ct. 2705-06; Perry, supra, 460 U.S. at 46. Further, the regulation need not be the

most reasonable restriction. Lee, supra, at 2708. Our prior opinion held that this regulation served a significant state interest in precluding postal workers from political entanglement, and it satisfied the requirement for a content-neutral time, place, and manner restriction. In view of our prior opinion, it logically follows that this regulation also meets the lesser requirement of reasonableness. Nothing in Burson, a case involving a public forum, requires a contrary result.

III.

To summarize:

Although the regulation involved in this case no longer can be found content-neutral, the postal walkway is a nonpublic forum with respect to which reasonable restrictions on speech may be imposed. We hold that the regulation is reasonable and survives constitutional scrutiny. We

adhere to our original disposition of this case.

Reversed.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 5, 1992

Ms. Martha Stone
Conn. Civil Liberties Union Fd
32 Grand Street
Hartford, CT 06106

Re: Frank Longo v. United States Postal Service, et al., No. 91-1988

Dear Ms. Stone:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Burson v. Freeman, 504 U.S. ____ (1992).

Very truly yours,

William K. Suter

Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of March one thousand nine hundred and ninety-two.

FRANK LONGO,

Appellee,

v.

DOCKET NUMBER:
91-6141

UNITED STATES
POSTAL SERVICE,
et al.,

Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellee.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for

rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,

Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 374—August Term 1991

(Argued October 23, 1991 Decided January 13, 1992)

Docket No. 91-6141

FRANK LONGO,

Appellee,

—v.—

UNITED STATES POSTAL SERVICE, *et al.*,

Appellants.

Before:

TIMBERS, WINTER and WALKER,

Circuit Judges.

Appeal from a summary judgment entered April 8, 1991, in the District of Connecticut, Allan H. Nevas, *District Judge*, 761 F. Supp. 220, holding unconstitutional as violative of the First Amendment a Postal Service Regulation which prohibited campaigning for election to pub-

lic office on Postal Service property at the Torrington, CT., Post Office.

Reversed.

ANDREW G. MCBRIDE, Associate Deputy Attorney General, (Stuart M. Gerson, Assistant Attorney General, Douglas N. Letter and Marc Richman, Attorneys, Dept. of Justice, Washington, D.C.; and Richard Palmer, United States Attorney, Bridgeport, CT., on the brief) *for appellants.*

MARTIN MARGULIES, Bridgeport, CT., *for appellee.*

TIMBERS, *Circuit Judge*:

Appellants United States Postal Service and Alden Victoria, in his official capacity as Postmaster of the Torrington Post Office ("the Postal Service"), appeal from a summary judgment entered April 8, 1991 in the District of Connecticut, Alan H. Nevas, *District Judge*, granting appellee Frank Longo summary judgment on his claim for declaratory and injunctive relief from a Postal Service regulation prohibiting campaigning for election to public office on Postal Service property on the ground that the regulation violated Longo's rights under the First Amendment on its face and as applied. In a comprehensive, well considered opinion, the district court held that the regulation, 39 C.F.R. § 232.1(h)(1) (1990),

is invalid to the extent that it prohibits campaigning on the interior post office walkway. 761 F.Supp. 220 (D.Conn. 1991)

On appeal, the government asserts that the district court correctly determined that the Postal Service property in question is a nonpublic forum, but contends that it erred in concluding that the regulation at issue is an unconstitutional restraint on expressive activity. Longo contends that the district court properly declared the regulation unconstitutional to the extent that it prohibits campaigning for election to public office on the exterior post office sidewalks; he also contends that the property in question is a public forum and that the regulation therefore should be reviewed under the strictest level of scrutiny.

For the reasons that follow, we reverse the district court's summary judgment which held that the prohibition set forth in § 232.1(h)(1) against campaigning for election to public office on an interior post office walkway is unconstitutional.

I.

The facts are not in dispute. They were set forth clearly in the district court's opinion. We summarize only those facts and proceedings believed necessary to an understanding of the issues raised on appeal.

In 1988, Frank Longo attempted to run for the United States Senate as an independent candidate from the State of Connecticut. Longo had to obtain approximately 9800 signatures in order to get on the ballot. On May 25, 1988, Longo set up a table and chair on the postal walkway adjacent to the entrance to the Post Office Building in Torrington. He began to solicit signatures in support of his candidacy. Postmaster Alden Victoria informed him that his action violated the Postal Service regulation set forth in 39 C.F.R. § 232.1(h)(1),

which prohibits "campaigning for election to any public office." After the postmaster asked him to leave the premises, and after the postmaster showed him a copy of the regulation, Longo refused to leave. When Longo continued to ignore the postmaster's request, he was arrested by the Torrington Police and charged with criminal trespass. On July 13, the charges against Longo were dropped in exchange for his promise to cease his campaign activities on postal property. Longo nevertheless returned to the same walkway on four occasions to solicit signatures. Several postal patrons complained that Longo was abusive when they refused to sign his petition or when they questioned his use of postal property for his signature campaign.

On August 12, Longo commenced this action seeking declaratory and injunctive relief. He asked that the postal regulation be declared unconstitutional as violative of the First Amendment's protection of freedom of speech and that further enforcement of the regulation be enjoined. He challenged the validity of the regulation on its face and as applied to him. As the district court found, the Torrington Post Office is located on property which is owned by the Postal Service. It is used exclusively for postal service operations. The interior postal walkway on which Longo attempted to solicit signatures for his campaign is adjacent to the entrance to the post office building. The walkway lies 289 feet from the nearest public thoroughfare, from which it is separated by the Post Office parking lot, driving lanes, and garage space for postal vehicles.

By the mutual agreement of the parties, Longo's action was stayed pending the Supreme Court's resolution of a similar issue in *United States* v. *Kokinda*, 110 S.Ct. 3115 (1990). In *Kokinda*, the Court addressed the constitutionality of the prohibition set forth in 39 C.F.R. § 232.1(h)(1) against "[s]olic-

iting alms and contributions" on postal property. *Kokinda* involved a postal walkway that is similar in all material respects to the walkway on which Longo attempted to solicit signatures for his campaign for the United States Senate. The Court found that the regulation prohibiting the solicitation of alms and contributions was constitutional. A plurality of four (opinion by O'Connor, J.) held that the walkway was a non-public forum and that the regulation was a reasonable, viewpoint-neutral restraint on First Amendment activity. Justice Kennedy, without categorizing the walkway in question as a specific type of forum, concluded that the regulation was an appropriate time, place and manner restriction. *Id.* at 3125.

II.

Since the facts are not in dispute, our task is to determine whether the district court correctly applied the law in granting Longo's motion for summary judgment. *City of Yonkers* v. *Otis Elevator Co.*, 844 F.2d. 42, 45 (2 Cir. 1988); Fed. R. Civ. P. 56(c). We hold that the district court erred in determining that the postal regulation at issue unconstitutionally prohibited Longo from campaigning for public office on postal property. We find that the regulation is a valid time, place and manner restriction on speech activity.

III.

(A)

It is undisputed that Longo's solicitation of signatures is a form of speech protected by the First Amendment. *See Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 629 (1980); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "Even protected speech," however, "is not equally permis-

sible at all times." *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 789 (1985).

The Supreme Court has developed a tripartite framework for analyzing First Amendment issues that arise when the government attempts to regulate expression on government property. This analysis focuses on the nature of the forum that the government seeks to regulate. Regulation of speech activity on property that traditionally has been open to the public for expression activity is subject to close scrutiny. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). "Public fora" are generally of the nature described by Justice Roberts when he stated:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

Hague v. *C.I.O.*, 307 U.S. 496, 515 (1939). In these public fora the government may exclude communicative activity based on its content only if it can show that the regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Perry*, *supra*, 460 U.S. at 45; *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980).

The government also may enforce content-neutral time, place and manner restrictions in such public fora provided they are narrowly tailored to serve a significant government interest and alternative means of communication are left open. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, *supra*, 460 U.S. at 45. This same standard of scrutiny is applied to property that the government has dedicated to speech. *Perry*, *supra*, 460 U.S. at 46. As the district court stated, "the government does not cre-

ate a public forum through unconscious, unspoken practices or by permitting limited discourse but 'only by intentionally opening a nontraditional forum for public discourse.' " *Longo*, *supra*, 761 F.Supp. at 226 (quoting *Cornelius*, *supra*, 473 U.S. at 802); *see also Paulsen* v. *County of Nassau*, 925 F.2d 65, 69 (2 Cir. 1991). Such areas when so dedicated by the government are referred to alternatively as "limited" public fora, *Perry*, *supra*, 460 U.S. at 47, or as "designated" public fora, *Cornelius*, *supra*, 473 U.S. at 802. Nonpublic fora, those which are neither a traditional nor dedicated public forum, are subject to a different standard of review. Regulation of speech activity on such property must be *reasonable* and not based on the *viewpoint* of the speaker. *United States* v. *Kokinda*, 110 S.Ct. 3115, 3121 (1990) (plurality opinion); *Perry*, *supra*, 460 U.S. at 46.

In *Kokinda*, the plurality of four justices (opinion by O'Connor, J.) found that the postal walkway in question was a nonpublic forum and held that the regulation was both reasonable and viewpoint-neutral. Justice Kennedy joined in the judgment of the plurality, but stated that the forum analysis applied by the plurality fails adequately to protect First Amendment interests. Although Justice Kennedy did not definitively find that the postal walkway was a public forum, he stated that "heightened First Amendment protection" was appropriate in order "to protect public places where traditional modes of speech and forms of expression can take place." *Kokinda*, *supra*, 110 S.Ct. at 3125. Justice Kennedy joined in the judgment of the plurality because he found that § 232.1(h)(1)'s prohibition of "[s]oliciting alms or contributions," was an appropriate time, place, and manner restriction on protected speech. *Id.* at 3125-26.

In our recent decision in *International Soc'y For Krishna Consciousness, Inc.* v. *Lee*, 925 F.2d 576 (2 Cir. 1991), we did not reach the issue of whether airport terminals are tra-

ditional, designated, or nonpublic fora. Instead, we upheld a prohibition on the in-person solicitation of funds in airport terminals because it satisfied the criteria set forth by both the plurality and Justice Kennedy in *Kokinda*. Similarly, since we find that the postal regulation here involved is an appropriate time, place and manner restriction, it is unnecessary to categorize the postal walkway as a particular type of forum.

(B)

Time, place or manner restrictions on expressive activity are constitutional, regardless of the type of forum involved, provided they are reasonable. *Perry*, *supra*, 460 U.S. at 46; *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 536 (1980); *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972). The Supreme Court has developed a test for determining whether a time, place or manner restriction is in fact reasonable: it must be narrowly tailored to serve a significant government interest, alternative means of communication must be left open, and the restriction on speech must be content-neutral. *Rock Against Racism*, *supra*, 491 U.S. at 791; *Clark*, *supra*, 468 U.S. 293; *Heffron*, *supra*, 452 U.S. at 648.

The postal regulation involved in the instant case is justified by different purposes than was the regulation in *Kokinda*. The primary justification for the prohibition against campaigning on postal property is that it enables the Postal Service to avoid both actual entanglement in partisan politics and the appearance of political favoritism. Longo asserts that there is insufficient basis for a conclusion that such entanglement would occur absent the regulation at issue. The validity of the regulation, however, "need not be judged solely by reference to the [expressive activity] at hand."

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-97 (1984).

If campaigning for public office on public property were not prohibited, the Postal Service surely would be beset by requests from eager politicians competing for time and space in the most strategic locations possible, such as the postal walkway involved in this case. Postmasters therefore would be hard pressed to avoid the sort of embroilment in partisan politics that Congress tried to prevent when it reorganized the Postal Service in 1970. *See* H.R. Rep. No. 1104, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong & Admin. News 3649, 3661 ("[O]ne of the cardinal needs of postal reform is to seal off the Postal Service from partisan political influence."); *Id.* at 3654 ("If the American public is to have the postal service that it expects and deserves, the Post Office must be taken out of politics and politics out of the Post Office."). Also, the Supreme Court has upheld the provision of the Hatch Act, 5 U.S.C. § 7324(a)(2) (1982), which forbids federal employees from playing "an active part in political management or in political campaigns." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding same language).

Moreover, on several occasions the Supreme Court has recognized that the avoidance of partisan entanglement or the appearance of political favoritism is a valid justification for restricting First Amendment speech activities. *E.g.*, *Cornelius*, *supra*, 473 U.S. at 809 ("[A]voiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum."); *Greer* v. *Spock*, 424 U.S. 828, 839 (1976) ("[K]eeping official military activities there wholly free of *entanglement with partisan political campaigns of any kind*" deemed "a policy that the military authorities at Fort Dix were constitutionally free to pursue.") (emphasis added); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974)

("[L]urking doubts about favoritism, and sticky administrative problems [that] might arise in parceling out limited space to eager politicians" helped justify a policy of not permitting political advertising while permitting other types of advertising on city's mass transit cars.).

We therefore hold that the Postal Service's interest in avoiding partisan political entanglement and the appearance of political favoritism is at least as significant as the governmental interests in "preventing 'visual blight' in its cities, *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984), in 'maintaining [public] parks . . . in an attractive and intact condition,' *Clark*, *supra*, 468 U.S., at 296, and in 'avoiding congestion and maintaining the orderly movement' of persons using a public forum, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981) . . . ." *Kokinda*, *supra*, 110 S.Ct. 3126 (Kennedy, J., concurring) (parallel citations omitted).

We next consider whether the prohibition set forth in § 232.1(h)(1) against "campaigning for election to public office" is narrowly tailored to achieve its desired purpose and whether it leaves open adequate alternative channels for communication. We find that the postal regulation meets both of these criteria.

We recognize that a complete ban on a category of speech activity generally is considered narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Shultz*, 487 U.S. 474, 485 (1988). In *Frisby*, the Court cited *Vincent*, *supra*, 466 U.S. at 789, as an example of a complete ban that was constitutional. The *Frisby* Court stated that the regulation in *Vincent*, which banned all signs on public property, was constitutional because the interest supporting the regulation, avoiding visual blight, rendered each sign a targeted evil. *Frisby*, *supra*, 487

U.S. at 485-86 (citing *Vincent*, *supra*, 466 U.S. at 810); *see also Clark*, *supra*, 468 U.S. at 297.

Just as some types of signs would create less visual blight than others, some forms of political campaigning, such as the handing out of leaflets, no doubt would cause less physical disruption of postal activities and would put less pressure on the Postal Service to handle competing demands for time and space, than did Longo's attempt to solicit signatures. They would all risk, however, embroiling the Postal Service in partisan politics to some degree. Furthermore, other types of campaigning, such as the setting up of campaign displays or the staging of mini-rallies would disrupt postal activities and entangle the Postal Service in partisan politics even more than Longo's attempts to solicit signatures. The regulation therefore properly focusses on the "targeted evil". It does not proscribe a wide range of other speech activity, such as the discussion of political issues, or the expression of one's views on an upcoming election and the candidates who are running therein. We hold that the prohibition of campaign activity on postal premises in § 232.1(h)(1) is sufficiently narrow to pass scrutiny.

The postal regulation leaves open adequate alternative means of communication. As stated above, the regulation allows members of the public to engage in a wide variety of expressive activity. It only prohibits campaigning for public office on postal property. Politicians remain free to campaign on any street, sidewalk, park or other traditional public forum, and they may utilize the various news media and the mail as well. *Clark*, *supra*, 468 U.S. at 295.

We turn now to the final criteria for measuring the reasonableness of time, place and manner restrictions: content neutrality.

The term "content" embodies several related, yet different, concepts. In *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), the Court stated that restrictions on speech should not "restrict expression because of its message, its ideas, its subject matter, *or* its content." *Id.* at 95 (emphasis added). Although in *Mosley* the Court spoke of "content" in the alternative, all of the factors referred to in *Mosley* as impermissible bases for restrictions on expression have fallen under the rubric of "content". The *Mosley* court itself stated that "[t]he essence of this forbidden censorship is content control." *Id.* at 96.

Restrictions on expression because of disagreement with message or idea being conveyed by the speaker clearly violate the First Amendment. Such viewpoint-based restrictions would "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Mosley*, *supra*, 408 U.S. at 96 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Indeed, viewpoint-based restrictions are viewed as more threatening to First Amendment rights than are other forms of content-based restrictions on speech. Under the tripartite forum analysis the Supreme Court has adopted in recent years reasonable restrictions on expression in a non-public forum are constitutional provided only that they not discriminate on the basis of *viewpoint*; other forms of *content* discrimination are permissible. *E.g.*, *Kokinda*, *supra*, 110 S.Ct. at 3121; *Perry*, *supra*, 460 U.S. at 46. Even with time, place, and manner restrictions on speech in a public forum, the Court has at times focussed on viewpoint neutrality. *E.g.*, *Rock Against Racism*, *supra*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality, in speech cases generally, and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it

conveys.") The distinction between content and viewpoint neutrality, however, occasionally is blurred. *See, e.g., Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (Park regulation permitting camping only in certain areas of the park "clearly satisfied" requirement that it be "content-neutral" because it was "not being applied because of disagreement with the message presented."); *U.S Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U.S. 114, 135 (1981) (Postal regulation prohibiting unstamped "mailable matter" in a letter box "is content-neutral because it is not directed at the content of the message appellees seek to convey . . . .") (Brennan, J., concurring).

A viewpoint-based restriction on expressive activity, however, is not the only form of impermissible content control. Regulations that foreclose discussion of a particular subject matter entirely (i.e. regardless of viewpoint), or that allow expression relative to some topics but not to others, have been held unconstitutional as content-based restrictions. *E.g., Widmar* v. *Vincent*, 454 U.S. 263 (1981) (University's regulation prohibiting the use of the University's buildings or grounds "for purposes of religious worship or religious teaching" held unconstitutional as a content-based restriction on speech); *Carey* v. *Brown*, 447 U.S. 455 (1980) (Regulation allowing peaceful labor picketing but prohibiting other types of peaceful picketing held unconstitutional as based on the content of the speech.); *Mosley*, *supra*, 408 U.S. 92 (same).

In *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530 (1980), the Court recognized that such restrictions on speech are more precisely described as based on subject matter rather than "content." *Id.* at 536 (citing *Mosley*, *supra*, 408. U.S. at 282). The Court held that the regulation prohibiting the inclusion, in monthly bills, of inserts discussing controversial issues of public policy was based on subject matter and therefore violated the First Amendment. The First

Amendment prohibits the regulation of speech based on subject matter because the government must not be allowed to "select which issues are worth discussing or debating . . . ." *Mosley*, *supra*, 408 U.S. at 96; *see also Consolidated Edison*, *supra*, 447 U.S. at 538 ("To allow a government a choice of permissible subjects for public debate would be to allow that government control over the search for political truth.").

The prohibition set forth in § 232.1(h)(1) against "campaigning for election to public office on postal property" is decidedly viewpoint neutral. Whether a candidate is a member of the Republican, Democratic, Libertarian or other party, and whether he or she espouses a philosophy that strikes a resonant chord with conservatives or liberals, he or she is not allowed to campaign on postal property. The regulation, however, is somewhat based on subject matter. It prohibits only speech activity that constitutes "campaigning for election to public office," while other speech activity, such as the handing out of leaflets in support of a cause, is allowed.

Although the regulation thus is content-based, when the term "content" is given its most inclusive construction, the blanket prohibition against campaigning does not reflect an attempt by the government to select the subjects that may be discussed publicly, *c.f. Mosley*, *supra*, 408 U.S. at 96, nor does it in any way suggest that the government is attempting to "control the search for political truth." *C.f. Consolidated Edison*, *supra*, 447 U.S. at 538.

Moreover, the Supreme Court has recognized that "in narrow circumstances . . . the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Id.* at 538-39 (citing *Greer* v. *Spock*, 424 U.S. 828 (1976) and *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974)). Specifically, in both *Greer* and *Lehman*, the Supreme

Court upheld the constitutionality of restrictions that singled out partisan political speech, while allowing speech as to other subject matters, because such partisan speech would disrupt the legitimate purpose to which the property had been dedicated. *See Consolidated Edison*, *supra*, 447 U.S. at 538-39 (discussing *Greer* and *Lehman*).

We therefore find that, in view of the nature of the governmental interest served by the regulation prohibiting campaigning on postal property and the fact that the regulation neither discriminates on the basis of viewpoint nor restricts the scope of the public debate, the regulation is sufficiently content-neutral to pass scrutiny as a reasonable time, place and manner restriction.

This Postal Service regulation is a reasonable time, place and manner restriction on protected speech on postal walkways. It serves a significant governmental interest, is narrowly tailored to achieve its objective, and leaves open adequate alternative means of communication. Furthermore, the regulation does not discriminate on the basis of viewpoint, nor does it reflect an attempt to regulate the scope of public debate. We therefore hold that the prohibition in 39 C.F.R. § 232.1(h)(1) against "campaigning for election to public office" is a valid restraint on expression.

IV.

Longo also challenges the postal regulation on its face, asserting that the regulation's proscription against campaigning is so overbroad that it would have a deterrent effect on free expression. Under *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973), "the overbreadth of a statute [or regulation] must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Although

"[t]he concept of "substantial overbreadth is not readily reduced to an exact definition . . . [i]t is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Vincent*, *supra*, 466 U.S. at 800.

In the instant case, Longo does little more than suggest that there could be applications of the proscription in § 232.1(h)-(1) against campaigning on postal property that would prove unconstitutional. In light of this we abide by the general rule that "a litigant only has standing to vindicate his own constitutional rights." *Id.*. Longo's facial challenge of the postal regulation therefore is dismissed.

V.

To summarize:

The district court erred in determining that the postal regulation prohibiting campaigning for public office on postal property violates the First Amendment as applied to postal walkways. We hold that the regulation survives constitutional scrutiny as an appropriate time, place and manner restriction.

We reverse.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 AHN

UNITED STATES POSTAL SERVICE, et al.

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Alan H. Nevas, United States District Judge, and,

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the plaintiff's motion and denying the defendants motion.

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiff.

Dated at Hartford, Connecticut, this 9th day of April, 1991.

KEVIN F. ROWE, Clerk

BY: _____
Dennis P. Iavarone
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 (AHN)

UNITED STATES POSTAL SERVICE, et al.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this case, the plaintiff, Frank Longo ("Longo"), sues the defendant, the United States Postal Service ("USPS"), for violating his constitutional rights under the First and Fifth Amendments to the United States Constitution by preventing him from soliciting signatures on a petition enabling him to run for political office. The plaintiff alleges that the section of 39 C.F.R. §232.1(h)(1) (1985) prohibiting campaigning for election to public office on Postal Service Property violates the First Amendment both on its face and as applied. Pending are cross

motions for summary judgment, pursuant to Rule 56, Fed. R. Civ. P. For the reasons stated below, the plaintiff's motion for summary judgment is granted and the defendant's motion for summary judgment is denied.

I.

A.

The undisputed facts[1] sketch the following narrative. In 1988, the plaintiff, Frank Longo, a long-time participant in state and local politics, attempted to run for the United States Senate from Connecticut as an independent candidate. In order to qualify for a place on the ballot, he was required to collect approximately 9800 signatures on petitions. On May 25, 1988, Mr. Longo attempted to

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[1] The parties stipulated to the material facts not in dispute. See Parties' Joint Statement of Material Facts Not in Dispute (filing 25).

solicit signatures in support of his candidacy at the Torrington Connecticut Post Office. At that time he set up a table and chair on the interior postal walkway adjacent to the entrance of the Post Office Building. Postmaster Alden Victoria informed Mr. Longo that such actions violated the USPS regulation set forth in 39 C.F.R. §232.1(h)(1),[2] and directed him to leave the premises. When he refused, Mr. Longo was shown a copy of the regulation. For his continued refusal to leave, he was

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[2] The regulation at issue, contained in the Postal Service Manual Section 221.654, provides in pertinent part:

> (h) Soliciting, electioneering, collecting debts, vending and advertising. (1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.

39 C.F.R. §232.1(h)(1) (emphasis added).

arrested by the Torrington Police for Criminal Trespass. On July 13, 1988, the charges against Mr. Longo were dropped in exchange for his promise to comply with the regulation. Nevertheless, Mr. Longo returned on four separate occasions between July 25 and August 12, 1988 to solicit additional signatures for his petition, each time setting up a table and chair on the same interior walkway.[3] During these latter occasions, several postal patrons complained that Mr. Longo was abusive when they refused to sign his petition or when they questioned him as to his reasons for using Postal Service property.

The Torrington Connecticut Post Office is located on property owned by the Postal

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[3] Because the May 25th incident was still under review by Postal Service Officials, it was decided that no further action would be taken pending completion of the review.

Service which is used exclusively for postal service operations. The postal service-owned lot is surrounded by public, municipal sidewalks and streets, and the post office building is separated from those sidewalks and streets by an interior postal walkway, a parking lot, driving lanes and garage space for postal service vehicles. (See Appendix A). The interior postal service walkway is adjacent to and leads to the entrance to the post office building. This walkway provides the only means by which customers of the post office may travel from the parking lot to the post office building.

B.

Although the complaint was filed on August 12, 1988, the suit was stayed by mutual agreement of the parties when the United States Supreme Court granted certiorari in United States v. Kokinda, 866

F.2d 699 (4th Cir. 1989), cert. granted, 110 S.Ct. 47 (1989). See Order on Parties' Joint Motion to Stay Further Proceedings Pending Supreme Court Decision, October 16, 1989 (filing 35). Kokinda involved the ban on solicitation of alms and contributions prohibited by the same post office regulation at issue in the instant case. The third, ninth, eleventh and D.C. circuits had held that postal walkways are nonpublic fora; the fourth circuit in Kokinda had reversed the district court's holding that the exterior postal sidewalk was a nonpublic forum.[4] The parties in the

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[4] Prior to the Supreme Court's reversal of the fourth circuit's holding in United States v. Kokinda, 866 F.2d 699 (4th Cir. 1989) the Circuit Courts of Appeals were in conflict with respect to the proper forum designation to be applied to post offices situated similarly to the instant post office. All of the Circuit Courts of Appeals that had addressed this issue, with the exception of the fourth circuit, had found that postal premises are not traditional public fora. See Monterey

instant case expected that the Supreme Court's ruling in Kokinda would decide whether exterior postal sidewalks are public fora. In Kokinda, 110 S.Ct. at 3115, the Supreme Court in a 5-4 decision sustained the no-solicitation of funds rule. Four of the justices in Justice O'Connor's plurality held that exterior postal sidewalks are not public fora. Justice Kennedy concurred in the judgment only and noted that he found it unnecessary to decide the public forum issue because he believed that even in a public forum, the no-solicitation of funds rule would pass time, place, and manner review. Kokinda, 110 S.Ct. at 3125-26. The four dissenting

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Democratic Cent. Comm. v. United States Postal Serv., 812 F.2d 1194 (9th Cir. 1987); United States v. Belsky, 799 F.2d 1485 (11th Cir. 1986); United States v. Bjerke, 796 F.2d 643 (3rd Cir. 1986); Am. Postal Workers Union v. United States Postal Serv., 764 F.2d 858 (D.C. Cir. 1985).

justices (Brennan, Blackmun, Marshall, and Stevens) concurred that exterior postal sidewalks are public fora.

After Kokinda was decided, the parties filed supplemental memoranda to their cross-motions for summary judgment. This court heard oral argument on December 3, 1990. The plaintiff now argues that Justice Kennedy, if considering the no-campaigning part of the rule rather than the no-solicitation of funds subsection, would have joined the dissenters in the view that exterior postal sidewalks are public fora.

The defendants, on the other hand, argue that the Kokinda plurality decided the issue at stake in the instant case, that exterior postal sidewalks are nonpublic fora, and that the ban on campaigning challenged here is content-neutral, since, as with the ban on the solicitation of funds at issue in Kokinda,

"it is needed to avoid the inherent delays and disruptions caused by such activity, the uncomfortable even intimidating or confrontational atmosphere it can create, and the administrative burden that would be imposed on postal officials if a case-by-case regulatory approach were required." Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment, at 3 (filing 24). Thus the defendants argue that Kokinda fully supports their position that the ban on political campaigning in 39 C.F.R. §232.1(h) is a reasonable and content-neutral regulation which passes constitutional muster under either the reasonableness standard applicable to nonpublic fora or under time, place and manner review.

C.

To prevail on a Rule 56 motion, a movant must demonstrate "that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. On a motion for summary judgment, the court does not try issues of fact, and summary judgment is inappropriate where factual issues are in dispute. 6 J. Moore, W. Taggart, & J. Wicker, Moore's Federal Practice, para. 56.04 (2d ed. 1988). The burden of demonstrating the absence of a genuine issue rests with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). This burden does not shift when cross-motions are before the court: each motion must be judged on its own merits. Schwabenbauer v. Bd. of Ed., 667 F.2d 305, 314 (2d Cir. 1981). Pursuant to Rule 16, Fed. R. Civ. P., and Rule 9(c), R. Civ. P. (D. Conn.), the parties have stipulated to material facts in conjunction with their cross-motions for summary

judgment. Thus, in the instant matter, the parties are not in dispute as to the material facts; instead, they differ in their interpretations of the law applicable to the case. Because resolution of questions of law is uniquely a judicial function, the court finds that the cross-motions have placed the disputed issues squarely before the court.

II.

It is established that campaigning for public office is an activity that may receive First Amendment protection. See Buckley v. Valeo, 424 U.S. 1 (1976);[5] Meyer

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[5] In Buckley v. Valeo, the Court struck down legislation limiting campaign expenditures, referring to such expenditures as "core First Amendment expression" since "advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. at 48. Thus the First Amendment "has its fullest and most urgent application

v. Grant, 486 U.S. 414, 424 (1988).[6] On the other hand, under appropriate circumstances, the government may, consistent with the Constitution, limit the exercise of First Amendment rights on public property.[7] "[T]he First Amendment

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precisely to the conduct of campaigns for political office." Id. at 15.

[6] In Meyer v. Grant, the Supreme Court characterized the circulation of an "initiative" petition by proponents of a new law or amendment who may have their proposal placed on the ballot at a general election if they can obtain enough signatures of qualified voters in a six-month period, as "involv[ing] the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" Meyre, 486 U.S. at 422.

[7] It is well established that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . ." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961). This distinction was reflected in the Supreme Court's opinion in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) which upheld a

does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981). The question presented in the instant case is whether the USPS restriction prohibiting campaigning for public office on post office property is a permissible one.

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ban on political advertisements in city transit vehicles:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

Id. at 303.

In balancing the government's interest in limiting the use of its property against the interest of those who wish to use the property for expressive activity, the Supreme Court has classified government owned property into three categories: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). Accordingly, the Court established that the ability of the government to restrict First Amendment activity on public property is not absolute but rather depends on "the character of the property at issue." Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

A.

In Perry, the Supreme Court announced a tripartite framework for determining how First Amendment interests should be

analyzed with respect to government property. 460 U.S. at 44-46.[8] In places which by long tradition or by government fiat have been devoted to assembly and debate, the right of the government to limit expressive activity is sharply circumscribed. Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986) (quoting Perry, 460 U.S. at 45). At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."

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[8] The Court's three-tiered framework focuses on the purposes and attributes of the forum rather than the speaker's desired audience and has become "the governing paradigm where. . . a court must ascertain whether to apply strict scrutiny or some less demanding standard." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 1991 U.S. App. Lexis 2264 (Feb. 8, 1991 2d Cir.).

Perry, 460 U.S. at 45 (quoting Haque v. CIO, 307 U.S. 496, 515 (1939)). In these quintessential public forums, the government authority to regulate speech is limited; in such places communication may not be completely prohibited. Perry, 460 U.S. at 45. For the government to enforce a content-based exclusion, it must demonstrate that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. Carey v. Brown, 447 U.S. 455, 461-62 (1980). The government may also enforce regulations of the time, place and manner of expression which are content-neutral and narrowly tailored to serve "a significant government interest, and leave open ample alternative channels of communication." Perry, 460 U.S. at 45 (citations omitted).

The second category consists of public

property opened and designated by the state for use by the public as a place for expressive activity. Courts refer to such fora as "limited" public fora, Perry, 460 U.S. at 47, or public form "by designation." Cornelius, 473 U.S. at 802. This type of public forum will often be very narrowly defined since the government does not create a public forum through unconscious, unspoken practices or by permitting limited discourse but "only by intentionally opening a nontraditional forum for public discourse." Id.; see also Paulsen v. County of Nassau, 925 F.2d 65 (2d Cir. 1991) (Nassau Colisuem held to be a limited public forum).[9] The Constitution forbids the government from enforcing

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[9] The Paulsen court reasoned that once the county opened the stadium grounds to various non-commercial activities, it could not constitutionally ban speech activities such as leafletting.

certain exclusions from a forum generally open to the public even if the government was not required to create the forum in the first place. See Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) (university meeting facilities).[10] Although the government need not retain indefinitely the open character of the facility, as long as it does so, First Amendment questions involving these places are controlled by the rules applicable to traditional public fora. Perry, 460 U.S. at 46. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to

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[10] A public forum may be created for a limited purpose such as use by certain groups. In Widmar, the Supreme Court held that a State University's exclusionary policy toward religious student organizations conducting meetings in school buildings where other student organizations were permitted to conduct meetings violated the principle that a state regulation of speech should be content-neutral.

effectuate a compelling state interest. Widmar v. Vincent, 454 U.S. at 269-70.

The third category consists of nonpublic fora.[11] Such property, which is neither by tradition nor by designation a forum for public communication, is governed by different standards. Property may be designated nonpublic regardless of whether it is owned by a private individual or by a government entity. The Supreme Court has recognized that the "[F]irst Amendment does

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[11] In addition to Kokinda, the Supreme Court has found nonpublic fora in the following cases, meriting an inquiry as to reasonableness and content-neutrality: Cornelius v. NAACP Legal Def. & Ed. Fund, 473 U.S. 788 (1985) (federal workplace not a public forum); Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system not a public forum); United States Postal Serv. v. Greenburgh, 453 U.S. 114 (1981) (letterbox not a public forum); Greer v. Spock, 424 U.S. 828 (1976) (sidewalks in military base not a public forum); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city bus not a public forum); Adderley v. Florida, 385 U.S. 39 (1966) (prison not a public forum).

not guarantee access to property simply because it is owned or controlled by the government." United States Postal Serv. v. Greenburgh, 453 U.S. at 129. In addition to time, place and manner regulations, the government may reserve a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Perry, 460 U.S. at 46 (citing Greenburgh, 453 U.S. at 131, n.7). "'"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."'" Greenburgh, at 129-30 (quoting Greer v. Spock, 424 U.S. 828, 836 (1976), in turn quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).

The plaintiff contends that, although

the sidewalk on which he was campaigning is on postal service property, it is not distinguishable from other municipal sidewalks and must therefore be a traditional public forum subject to strict scrutiny. This argument is unpersuasive since the physical characteristics of the property alone cannot dictate forum analysis.[12] Kokinda, 110 S.Ct. at 3120. The mere fact that a walkway is a public sidewalk does not in itself identify it as a public forum. See United States v. Grace, 461 U.S. 171 (1983). Moreover, that a sidewalk is situated on publicly owned property, without more, is insufficient to

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[12] If this were not so, then Greet v. Spock, 424 U.S. 828 (1976) would have been decided differently. In Greer, the Supreme Court held that even though a military base permitted free civilian access to certain unrestricted areas, the base was a nonpublic forum. The presence of sidewalks and streets within the base did not require a finding that it was a public forum. Id. at 836-38.

accord it public forum status, Monterey County Democratic Central Comm. v. United States Postal Serv., 812 F.2d at 1197 (9th Cir. 1987), since the "state, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated." Adderley v. Florida, 385 U.S. 39, 47 (1966).

As the Supreme Court recognized in Grace, 461 U.S. at 178, the location and the purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum. Drawing authority from the Greer Court's distinction between the military walkways and the municipal walkways within the military base, the Court in Grace constructed a rule stressing the separateness of such military walkways from the municipal ones: the rule allows the

government to overcome the presumption that sidewalks are public fora when he federally owned sidewalk obviously is separate from municipal sidewalks, apprising those who approach of the difference. Grace, 461 U.S. at 180.

The Court in Grace was asked to strike down a statute prohibiting certain expressive activities on the Supreme Court grounds and the sidewalk forming the perimeter. The Court distinguished Greer, finding that the sidewalks surrounding the Supreme Court retained their public forum status because "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." Id. (emphasis added). The Court stated that "[t]he sidewalks comprising the outer

boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C.," id., at 179, and discerned no reason why they should be treated differently.

Postal entryways, like the military walkways at issue in Greer, may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment. Kokinda, 110 S.Ct. at 3120. In examining a challenge to the ban on solicitation of funds on Post Office property under 39 C.F.R. §232.1(h)(1), the "enclave" distinction in Grace was pivotal to the Kokinda Court's designation of the sidewalk at issue as a non-public forum. In Kokinda, the post office was described as follows:

> [T]he Bowie post office is a freestanding building with its own sidewalk and parking lot. It is

> located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

110 S.Ct. at 3118.

The layout of the post office in Kokinda is virtually identical to the layout of the Post Office in Torrington, Connecticut at issue in the instant challenge to 39 C.F.R. §232.1(h)(1). (See Appendix A). Both are located on property owned by the Postal Service and are used exclusively for postal service operations. Both lots are surrounded by public, municipal sidewalks and streets, with the buildings separated from those sidewalks and streets by an interior postal walkway,

a parking lot, driving lanes and garage space for postal service vehicles. Additionally the interior postal service walkways, adjacent to and leading to the entrance to the post office buildings, provide the only means by which post office customers may travel from the parking lots to the post office buildings. Thus, the Torrington post office walkway, like the post office walkway in Kokinda, resembles the "special type of enclave" described as lacking in Grace.

In the instant case, the postal sidewalk at issue has no more of the characteristics of public sidewalks traditionally open to expressive activity than the sidewalk scrutinized in Kokinda. Unlike traditional municipal sidewalks, the instant sidewalk, like the one in Kokinda, runs alongside a post office building that is separated from the municipal property by

a parking lot and driving lanes and leads only from the parking area to the front door of the post office. The walkway is 289 feet from Connecticut Route 4, the street running along the front of the postal premises. Further, the property itself is dedicated solely to postal operations. As in Kokinda,

> [U]nlike the public street described in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981), which was 'continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment,' id, at 651, 101 S.Ct. 2566, the postal sidewalk [which leads only from the parking area to the front door of the post office] was constructed solely to provide the passage of individuals engaged in postal business.

110 S.Ct. at 3120.[13] The postal sidewalk

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[13] In holding that a regulation requiring members of the International Association of Krishna Consciousness to

here was constructed for the sole purpose of assisting postal patrons to "negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." Id.

The Torrington post office walkway is separated from the municipal sidewalks by the post office parking area. "The isolated nature of the building and the surrounding walkway indicate to all who approach that the walkway services postal patrons entering the building and that it is not a thoroughfare for passersby intent on other errands." Monterey County, 812 F.2d at 1197. This fact is sufficient to overcome the presumption of public forum status

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confine their distribution, sales, and solicitation activities to a fixed location, the Court in Heffron compared the continuing openness of a public street with the temporary nature of the fair grounds. 452 U.S. at 650.

otherwise accorded sidewalks. It is evident to all who enter the property that "they have entered some special type of enclave," Grace, 460 U.S. at 180, dedicated to a specific business function. Thus, the right of access under consideration in the instant case is not the quintessential public sidewalk addressed in Frisby v. Schultz, 487 U.S. 474 (1988) (residential sidewalk held to be a public forum).

The plaintiff argues that even if the sidewalk is not a traditional public forum, the government's attempt to regulate its use for expressive activities must still be analyzed under the rules applicable to public fora because the Postal Service transformed the walkway into a limited public forum by permitting certain groups to use postal premises for expressive activities. This court again disagrees. The critical factor in deciding whether the

government has created a limited public forum is its intention. The "government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." Cornelius, 473 U.S. at 802 (emphasis in original). Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. Perry, 460 U.S. at 47.

In the instant case, at no time did the postal service open wide the doors to indiscriminate use by the public. The postal service has not explicitly dedicated its sidewalks to any expressive activity. Admittedly, individuals or groups have been permitted to leaflet, speak and picket on postal premises. However, a practice of

allowing some speech activities on postal property does not add up to the dedication of postal property to speech activity. Kokinda, 110 S.Ct. at 3121. "Selective access does not transform government property into a public forum." Id. (quoting Perry, 460 U.S. at 47). Here the uses made of the property were limited, and such "selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." Greer, 424 U.S. at 838, n.10.[14] This court thus finds that the postal walkway at issue in the instant challenge is a nonpublic forum.

B.

Because the Torrington Post Office

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[14]Even if a limited public forum had been created, the government is not required to maintain the character of the forum indefinitely but may withdraw the designation of particular property as a limited public forum. Perry, 460 U.S. at 46.

walkway is not a traditional or limited public forum open to the plaintiff, it falls into the third class of property, a nonpublic forum, thus obviating the need to determine whether the regulation is supported by a compelling government interest. Rather, the rules governing nonpublic fora apply, necessitating instead a determination as to whether the regulation on campaigning is reasonable[15] as well as content-neutral, i.e., not simply a mask for Postal Service opposition to the plaintiff's views.[16] The defendant

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[15]"The government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808.

[16]Although a speaker may be excluded from a nonpublic forum if he wished to address a topic not encompassed within the purpose of the forum, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), or if he is not a member of the class of speakers for whose benefit the forum was created, see Perry, 460 U.S. at 49, the government

asserts that the prohibition against campaigning for public office on postal premises is content-neutral and reasonable for two reasons. First, such a complete ban on campaigning insulates the Postal Service from politics. Specifically, the ban on political campaigning ensures that the Postal Service remains removed from partisan politics, that it does not appear to be influenced by politics, and that the public trust in a nonpartisan Postal Service is reaffirmed.[17] Secondly, the ban

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violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject. Cornelius, 473 U.S. at 806.

[17]With respect to this third politically related concern, the defendant has failed to allege any facts which, if proved, might show that public confidence in the system would be diminished by partisan political activity. See Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980) ("mere speculation of harm does not constitute a compelling state interest.")

on political campaigning prevents the disruption of the operations and primary functions of the postal service. This court finds neither of these arguments persuasive.

1. The Lack of Content Neutrality

As noted in Monterey County, government control over nonpublic fora includes:

> [t]he right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

812 F.2d at 1198 (quoting Perry, 460 U.S. at 49). See also Cornelius, 473 U.S. at 808. In the instant case, there is no evidence that the post office regulation is intended to encourage or discourage one

political viewpoint over another. Thus, the defendant asserts that by excluding all political campaigning, the post office is not granting to "one side of a debatable public question . . . a monopoly in expressing its views. . . .." City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976). The exclusion of all political campaigning, however, does not make the regulation content-neutral. Any restriction on speech relating to the substance of the speech is content-based, no matter what the government's interest may be. Boos v. Barry, 485 U.S. 312, 335-338 (1988) (Brennan, J., concurring in part and concurring in judgment). Here, the regulation is not content-neutral because it is tied explicitly to the content of the speech. The solicitation of signatures on a petition bearing no relation to politics is

permitted on postal premises whereas the solicitation of signatures in a political campaign is prohibited. Thus, the prohibition depends entirely upon the content of the petition.

The government argues that its interest in this case is related to the suppression of expression because the evil at which the postal regulation is aimed is the danger of political affiliation and the disruption of the operations and primary functions of the postal service which would result from annoying postal customers and discouraging them from patronizing the postal offices. See Kokinda, 110 S.Ct. at 3134 (Brennan, J., dissenting). The Post Office is concerned that being asked to endorse a political candidate may be annoying to some people, particularly when the campaigner is a member of a disfavored political persuasion. The defendant makes

much of the complaints received at the Torrington Post Office while the plaintiff was soliciting signatures. Memorandum in Support of Defendants' Motion for Summary Judgment, at 8 (filing 24). The record, however, demonstrates no complaints related to any difficulty in obtaining access to the post office. Although the Postal Service's paternalism may be well intended, a listener's reaction to speech is not a content-neutral basis for regulation. Speech is not subject to regulation "'simply because it may embarrass others or coerce them into action.'" Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988), (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).[18]

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[18]The Postal Service's desire to protect customers from speech with which they might disagree would not be a valid basis for regulation. Although the Supreme Court has held that speech in a nonpublic forum may be regulated so as to prevent

2. The Reasonableness of the Regulation

The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all the surrounding circumstances. Cornelius, 473 U.S. at 808. Although avoiding the appearance of political favoritism and preventing the obstruction of post office entrances and the disruption of postal functions are valid justifications for limiting speech in a nonpublic forum, see Greer v. Spock, 424 U.S. at 839; Lehman v. City of Shaker Heights, 418 U.S. at 304, the distinction drawn by the postal regulation between

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disruption of the forum Cornelius, 473 U.S. at 811, a restriction cannot be premised on the mere fact that some members of the public might disapprove of a speaker's message or means of delivery. Such expression "is still protected speech even in a nonpublic forum." Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 576 (1987). Kokinda, 110 S.Ct. 3115, 3138, n.13. (Brennan, J., dissenting).

signature solicitation for non-political reasons and political signature solicitation is not a reasonable one.

The plaintiff correctly asserts that the regulation, with respect to the elimination of obstructions to entry into the post office building and the disruptions of postal functions, is underinclusive. The regulation is underinclusive in that the postal service does not subject to the same categorical prohibition many other types of signature solicitation presenting the same risk of obstruction and disruption. The regulation permits other expressive activities that harbor the same potential for obstruction and disruption, i.e., voter registration by non-partisan organizations and signature gathering for purposes other than campaigning. For this reason, not only is this a content-based exclusion; it is

unreasonable as well.

Moreover, the ban on the solicitation of funds upheld by the Supreme Court in Kokinda noted, solicitation of alms or contributions requires a distinct action by those who would respond. "The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card." Kokinda, 110 S.Ct. at 3123. Thus, soliciting funds is an inherently more intrusive and disruptive activity than soliciting campaign signatures, where all that is required is a signature on a petition rather than a search for a wallet, a checkbook or a credit card. The distinction between the solicitation of funds and the solicitation

of signatures in a political campaign is supported by the second circuit's recent holding "that the Port Authority must provide reasonable access to the [airline] terminals for the distribution of literature." Int'l Soc'y for Krishna Consciousness v. Lee, 1991 U.S. App. Lexis 2264 (2nd Cir. Feb. 8, 1991).[19] In Lee, the second circuit interpreted Kokinda to allow the distribution of literature, or leafletting, in nonpublic fora such as a postal walkways or airline terminal walkways, in contrast to the solicitation

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[19] The Lee court, relying on Kokinda, rejected the views of other circuits, holding that airport terminals are not public fora because they are remote from pedestrian thoroughfares and are intended solely to facilitate air travel. Thus the court held that the solicitation of funds may be banned in the terminals, whereas the distribution of leafletting must be permitted.

of funds.[20] Indeed, the critical

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[20]The Lee court analyzed the Justices' position in Kokinda on expressive activities other than the solicitation of funds in non-public fora as follows:

> The four dissenting justices believed the sidewalk to be a public forum and additionally indicated that they perceived no relevant distinction between the in-person solicitation of funds and the distribution of leaflets. See 110 S.Ct. at 3126-39. They would therefore allow the latter in the air terminals in question. So too, we believe, would Justice Kennedy, whose concurring opinion stressed the need "to protect public places where traditional modes of speech and forms of expression can take place." 110 S.Ct. at 3125. Justice Kennedy relied entirely upon the distinction between the disruptive effect of the in-person solicitation of funds and the lesser inconvenience of the distribution of literature in upholding the Postal Service regulation and did not reach the public/nonpublic forum issue. We thus count him as having adopted a view that would permit the distribution of literature in the instant matter. We also note that the four justices who considered the post office sidewalk to be a nonpublic forum also relied in part on the distinction between in-person solicitation of funds and leafletting in upholding the

distinction in Kokinda was the inherent disruptiveness and intrusiveness of the solicitation of funds as opposed to other forms of expressive activity. Thus the Kokinda analysis of the reasonableness of the ban on solicitation of funds is inapplicable to the instant case.

Political campaigning, i.e., the solicitation of signatures in a political campaign, is no more intrusive than other forms of signature solicitation or distribution of literature that are permitted in the post office. Moreover, political campaigning is far less obtrusive than the political rallies[21] referred to by

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regulation. See 110 S.Ct. at 3123. There was thus at least a majority, and perhaps more, that would allow the latter.

[21]The authorization for political rallies to be held on post office premises flies in the face of the defendants' contention that the goal of the instant regulation is to prevent political

Justice Brennan[22] or the non-political demonstrations such as support for the war or anti-war rallies seen recently or pro-choice of pro-life rallies, none of which are prohibited on post office premises.

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favoritism. Not only is political campaigning less obtrusive and disruptive than political rallies; the potential for political favoritism in the former situation is much less than in the latter.

[22] In his dissent in Kokinda, Justice Brennan correctly asserted that:

> [a] solicitor who asks for funds and offers literature for sale outside the entrance to a post office is no more likely to block access than is a leafletter who stands in the same place or a speaker who sets up his soapbox there. In fact, solicitors may be quite unlikely to attract much of an audience. . . . Under the regulation, a group may stage a political rally to call attention to the problem of drug abuse and draw hundreds or even thousands of persons to an area just outside the entrance to the post office, because there is no general prohibition on large gatherings on postal premises.

Kokinda, 110 S.Ct. at 3137 (Brennan, J., dissenting) (footnotes omitted).

This inconsistent treatment renders the prohibition on campaigning unreasonable. As stated, the postal service undeniably has a legitimate interest in avoiding political favoritism, avoiding disruption of its postal facilities, and ensuring that its buildings remain accessible to the public. The government interest in preventing disruption of post office business or harassment of postal patrons, however, is addressed by the direct prohibitions on such conduct in existing postal rules[23] and the Postal

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[23]Post office rules prohibit individuals from obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. For example, Section 232.1(e) provides that:

> Disorderly conduct, or conduct which creates loud and unusual noises, or which obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to

Service has not explained why these provisions are inadequate to deal with any such disruptions caused by campaigning.

CONCLUSION

For the foregoing reasons, the ban on campaigning for public office on post office premises is neither reasonable nor content-neutral. Therefore, this court finds 39 C.F.R. 232.1(h) to be invalid to the extent that it forbids such campaigning on exterior post office sidewalks. Accordingly, the plaintiff's motion for summary judgment is granted and the defendant's motion for summary judgment is

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> impede or disturb the public in transacting business or obtaining the service provided on property, is prohibited.

39 C.F.R. 232.1(e). Similarly, subsection (k)(2) prohibits "[t]he blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on [postal] property." See also §232.1(c) which prohibits "creating any hazard to persons or things."

denied.

SO ORDERED this 8th day of April, 1991 at Hartford, Connecticut.

Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 AHN

UNITED STATES POSTAL

SERVICE, et al. August 15, 1989

AFFIDAVIT

Lynn Taborsak, being duly sworn, deposes and says:

1. I have first hand knowledge of the facts set out below, I am above the age of 18 years, and I understand and believe in the obligations of an oath.

2. I am currently a member of the Connecticut General Assembly representing the 109th district in Danbury. I have been a state representative for five years.

3. For the last 15 years, I have been a member of the Connecticut Chapter

of the National Organization for Women ("NOW"). From 1982 to 1984, I was the state coordinator of Connecticut NOW. From 1980 to 1982, I served as president of the Danbury Chapter of Connecticut NOW.

4. Over a ten year period during the 1970's and 1980's, Connecticut NOW conducted an extensive voter education and petition program in support of passage of the Federal Equal Rights Amendment. As one aspect of this program, Connecticut NOW distributed leaflets and collected petition signatures in public areas throughout the state.

5. The Danbury NOW Chapter participated in the above-mentioned voter education and petition program by distributing leaflets and collecting petition signatures at the United States Post Office and the Danbury Public Library on Main Street in Danbury. During 1978,

the Danbury Chapter frequented these sites on a monthly basis for a petition drive to extend the true period for ratification of the Equal Rights Amendment.

6. As a public official and a periodic candidate for elected office, I have extensive experience in using public sites as a forum for engaging in political speech.

7. Libraries and post offices are critical locations for voter education because of the large numbers of persons who frequent these facilities.

8. The significance of libraries and post offices as forums for political speech has been heightened given the proliferation of shopping centers and enclosed malls. The public has demonstrated a decided preference for frequenting private shopping malls rather than downtown commercial districts. As a

result, the traditional sites for engaging in protected speech -- municipal parks and sidewalks -- no longer provide an adequate forum for campaigning. Libraries and post offices are among the few remaining locations where it is possible to meet a large number of voters in a public setting.

9. Because of the problem of finding public areas where it is possible to interact with a large number of voters, Connecticut NOW sought permission to collect signatures on ERA petitions at West Farms Mall, the largest and most heavily attended mall in Connecticut. The owners of West Farms Mall refused permission. Connecticut NOW filed suit in state court to determine whether private malls are constitutionally entitled to prohibit expressive conduct. In a case styled Cologne v. West Farms Associates,

192 Conn. 48 (1984), the Connecticut Supreme Court ruled that the Connecticut Constitution provides no protection for speech related activities on private property.

10. In light of the decision in Cologne, the use of post offices as a forum for political speech has become even more critical.

11. I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: August 17, 1989

_____

Lynn Taborsak

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK LONGO

v. H-88-557 AHN

UNITED STATES POSTAL SERVICE, et al. August 12, 1988

AFFIDAVIT

Frank Longo, being duly sworn, deposes and says:

1. I have first hand knowledge of the fact set out below, I am over the age of eighteen years, and I understand and believe in the obligations of an oath.

2. I am a resident of Bristol, Connecticut, and a longtime participant in Connecticut state and municipal politics.

3. I am the plaintiff in this lawsuit.

4. In 1955, I was elected to the Town of Bristol Board of Tax Review.

5. In 1967 and 1969, I was elected to the Bristol Town Council, with victories in

Democratic Party primaries and the general elections.

6. In 1971 and 1973, I was elected Mayor of the Town of Bristol, prevailing in Democratic Party primaries and the general elections.

7. In 1979, 1981, and 1985, I unsuccessfully ran for Mayor of the Town of Bristol as an independent candidate.

8. In 1986, I ran for Governor of the State of Connecticut as an independent candidate. I qualified for a place on the ballot in the general election by collecting signatures on petitions from approximately 23,000 registered voters.

9. I used post offices as the primary sites for collecting petition signatures during my gubernatorial campaign. I collected signatures at numerous post offices including those in Bethel, Bristol, Danbury, Southington, Plainville, Westport,

Westbrook, Niantic, Farmington, Middletown, Meriden, West Haven, Winsted, Torrington, New Britain, Waterbury, New London, Thomaston, Terryville, Bloomfield, Naugatuck, Derby, Ansonia, and Wolcott. At no time during my gubernatorial campaign was I informed by postal service or law enforcement personnel that my electioneering was in violation of post office regulations.

10. In 1988, I attempted to run for United States Senate from Connecticut as an independent candidate. I needed to secure approximately 9800 signatures to qualify for a place on the ballot. I collected over 8,000 signatures.

11. Throughout my political career, I have run as an anti-establishment candidate, campaigning repeatedly against corruption on the part of elected officials and government employees.

12. I decided to run for the Senate against Senator Weicker because I disapproved of Senator Weicker's opposition to Judge Bork's nomination to the Supreme Court and because I disagreed with remarks made by Senator Weicker regarding the hijacking of the Achille Lauro by terrorists in the Mediterranean Sea. In my campaign, I planned to advocate a return to traditional values in all facets of American life.

13. On January 4, 1988, I secured petition forms from the Connecticut Secretary of State's Office for the Senate race. This was the first day on which the forms were available to members of the public.

14. My strategy for collecting petition signatures was predicated on the tactics I employed in my campaigns in Bristol and my statewide gubernatorial

effort. I did not plan to campaign heavily in the winter because persons are not receptive when the weather is cold to interrupting their routines, listening to a political appeal, and signing a petition. I intended to campaign every day with the onset of spring.

15. I began campaigning on a daily basis, weather permitting, in the spring immediately after Easter. I planned to use public areas in front of post office buildings as my primary site for collecting signatures. My normal practice was to set up a three foot by three foot card table in a nondisruptive location on post office property, sit on a folding chair at the table, offer leaflets to members of the public and request signatures.

16. Attached to this affidavit as "Longo Exhibit A" is an authentic copy of a leaflet that I distributed during my

senatorial campaign.

17. I campaigned at numerous post offices during my 1988 campaign, including those at Bethel, Danbury, Southington, Plainville, Westport, Westbrook, Niantic, Farmington, Bristol, Middletown, Meriden, West Haven, Winsted, Torrington, New Britain, Waterbury, New London, Thomaston, Terryville, Bloomfield, Naugatuck, Derby, Ansonia, and Wolcott. No post office or law enforcement personnel complained to me about my campaigning other than at the Torrington and New Britain post offices.

18. I campaigned at the Torrington Post Office (hereafter "the Post Office") on numerous occasions in 1988. This location was a fertile site for collecting signatures. The fewest number of signatures that I secured on any of my appearances in Torrington was 187.

19. The Torrington Post Office is

located on property owned by the Postal Service. The post office building is set back over 96 yards from the public road adjacent to the property. The building is separated from the road by a large parking lot. The building is separated from the parking lot by a sidewalk (hereafter "the post office sidewalk") that runs the length of the building and is approximately 5 2/3 yards wide.

20. The parties have filed a Joint Statement of Material Facts not in Dispute (hereafter "the Joint Statement"). Attached to this document as Exhibit 20 (hereafter Stip Ex. 20) is a diagram of the grounds of the Torrington Post Office. The numbers on the diagram reflect the dimensions of the property in feet.

21. The parties have stipulated to the authenticity of photographs that are attached to the Joint Statement.

(a) Stip. Ex. 1 and 9-11 are photographs of the Torrington Post Office taken from the proximity of the public road adjacent to the property.

(b) Stip. Ex. 2 through 6 and 14 through 16 are photographs illustrating the length and width of the "post office sidewalk." There is a bed of shrubs in the middle of the post office sidewalk. The width of the sidewalk on either side of the shrubs is substantially larger than the width of a typical municipal sidewalk.

(c) Stip. Ex. 7, 8, 12 and 13 are photographs of the Torrington Post Office building taken from the parking lot. On the left side of Exhibit 12 as it faces the reader, there is an enclosed self service area. Moving to the right on Exhibit 12, there is a door which is the public entrance to the Post Office Building. Close ups of the door are set out in Exhibit 8

and 17 through 19.

22. On most of the days when I campaigned at the Torrington Post Office, I located my table on the post office sidewalk close to the parking lot. This area is marked on Stip. Ex. 20 as "Loc. 1." I was able to address patrons from this location without in any way impeding access or hindering postal operations.

23. I campaigned at the Torrington Post Office on May 25, 1988. Because the weather was inclement, I moved my table from a location on the post office sidewalk close to the parking lot to a place on the post office sidewalk immediately next to the building and under an overhang. This location is marked on Stip. Ex. 20 as "Loc. 2". My new location was immediately next to coin-operated newspaper distribution boxes. The width of my table hardly extended beyond the width of the boxes. I was able

to campaign from this location without in any way impeding access or hindering postal operations.

24. Attached to this affidavit as "Longo Exhibit B" is an accurate photograph of my location at the Torrington Post Office when I moved next to the coin-operated newspaper boxes as described in paragraph 23.

25. While I was campaigning at the Post Office on May 25, Postmaster Victoria informed me that it was illegal to campaign for elective office on post office property and asked me to leave. I refused. Postmaster Victoria called the Torrington Police Department and I was arrested for criminal trespass.

26. "Longo Exhibit B" (attached to this affidavit) accurately depicts my arrest by officers from the Torrington Police Department.

27. On July 13, 1988, the criminal charges were dismissed.

28. I largely halted my campaigning during the seven week period while the criminal charges were pending. I feared campaigning at other post offices out of concern for additional criminal prosecutions. This was the first occasion on which I had ever been arrested. I was so preoccupied by the experience that I was unable to devote my energies to campaigning at other, albeit less productive, locations.

29. After the criminal charges were dismissed, I resumed campaigning at the Torrington Post Office and at other post offices.

30. Prior to my arrest, I was on schedule to gather a sufficient number of signatures to qualify for the ballot. The last day for submitting petitions to the

Secretary of State was August 12, 1988. As of that day, I had collected over 8,000 signatures. I needed approximately 9,800 signatures to qualify.

31. I am currently a candidate for Mayor of Bristol in an election to be held in November 1989. I qualified for a place on the ballot as an independent candidate by collecting signatures on petitions. I used the Bristol Post Office as a prime location for collecting signatures.

32. I plan to run for statewide office as an independent candidate in the future. In order to qualify for the ballot, I will need to collect petition signatures.

33. Post offices are critical sites for political campaigning. Post offices attract a large number of persons to a public location. Persons who frequent post offices tend to be literate and therefore more receptive to a political appeal and to

signing a petition. Also, persons entering post offices tend not to be carrying groceries or other bulky items that may be a hinderance to the communicating of a political message.

34. Post offices are the best available locations for making contact with large numbers of voters in a public area.

35. I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed:_____ _____

Frank Longo

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK LONGO
Plaintiffs

v. H-88-557 AHN

UNITED STATES POSTAL SERVICE
ALDEN VICTORIA, in his
official capacity as
Postmaster of the
Torrington Post Office

Defendants August 12, 1988

COMPLAINT

I. Preliminary Statement

1. Plaintiff brings this action to vindicate his right and the right of every citizen to engage in political speech and to collect signatures on petitions in order to qualify persons for access to the ballot as political candidates. Specifically, Plaintiff challenges the constitutionality of a postal service regulation which permits petitioning, leafletting, and discourse at the post offices unless the content relates to "...campaigning for

election to any public office...."

II. Nature of Action

2. This action arises under the First and Fifth Amendments of the United States Constitution.

III. Jurisdiction

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1339, and 39 U.S.C. Section 409.

IV. Parties

4. Plaintiff is a resident of Bristol, Connecticut and a citizen of the United States. Plaintiff was the Mayor of Bristol and a member of its City Council from 1967 to 1975. Plaintiff ran for Governor of the State of Connecticut in 1986, having secured a place on the ballot as an independent candidate by collecting signatures on petitions.

5. Defendant United States Postal

Service is responsible for promulgating and enforcing rules relating to the operations of branch post offices.

6. Defendant Alden Victoria is the Postmaster of the Torrington Post Office. He is being sued in his official capacity.

V. Factual Allegation

7. In the fall of 1987, Plaintiff decided to run for United States Senator from Connecticut in the 1988 election. Plaintiff planned to run as an independent candidate and to collect petitions in order to gain a place on the ballot.

8. Plaintiff secured petition forms from the State of Connecticut on January 4, 1988, the first day on which petition forms were made available for distribution.

9. Plaintiff began collecting signatures immediately upon receiving the petition forms and continued this activity through May 25, 1988.

10. On May 25, 1988, Plaintiff solicited signatures on a sidewalk in front of the United States Postal Service branch in Torrington, Connecticut. The sidewalk is the property of the Postal Service. Plaintiff situated himself so that he was not blocking pedestrians or vehicle traffic or otherwise interfering with Postal Service operations.

11. While Plaintiff was collecting signatures at the Torrington Post Office, he was approached by Postal Service employees, including Defendant Victoria, and ordered to cease his petitioning activity. When he refused to do so, he was arrested for criminal trespass by the Torrington Police Department.

12. The criminal charges against Plaintiff were dismissed on July 13, 1988.

13. Defendants secured Plaintiff's arrest pursuant to the following Postal Service

policy as contained in the Postal Operations Manual Section 221.654:

> Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and the display or distribution of commercial advertising on postal premises are prohibited.

39 C.F.R. §232.1(h)(1) (1985) (hereafter "the Challenge Regulation").

14. Consistent with the Challenge Regulation, persons throughout the country may engage in protected speech activity on Postal Service property, including collecting signatures on petitions. These activities are permitted so long as the speaker is not "campaigning for election to any public office".

15. Post offices are critical sites for the collection of petition signatures and for political campaigning. With the advent of privately owned shopping malls

and the resulting decline in pedestrian flow in many downtown areas, the significance of post offices as a forum for political activity has been magnified.

16. As a result of Plaintiff's arrest, his ability to gather signatures during the current senatorial campaign has been significantly impeded.

17. Plaintiff plans to run for Governor of the State of Connecticut in the 1990 election as an independent candidate. He plans to secure a place on the ballot by collecting signatures on petitions.

18. Without the ability to collect signatures at the Torrington Post Office and other post offices, Plaintiff's ability to effectively engage in political speech will be significantly curtailed.

19. As a consequence of the Challenged Regulation and its enforcement, Plaintiff has and will continue to suffer

irreparable injury and has no adequate remedy at law.

VI. Causes of Action

20. The Challenge Regulation violates the First and Fifth Amendments to the United States Constitution in that:

(a) it constitutes impermissible content discrimination in a public forum; and

(b) it significantly and unnecessarily inhibits protected political speech in a public forum.

WHEREFORE, Plaintiff prays that this Court:

1. Enter a declaratory judgment that the Challenged Regulation violates the First and Fifth Amendments to the United States Constitution to the extent that it prohibits activity relating to "campaigning for election to any public office".

2. Issue a permanent injunction

enjoining Defendants and their agents from enforcing the Challenged Regulation as it applies to "campaigning for election to any public office".

3. Grant the Plaintiff his costs and attorney's fees.

4. Order such other relief as justice may require.

PLAINTIFF
Frank Longo

Matthew M. Horowitz
For Blume & Elbaum

Martha Stone
Connecticut Civil
Liberties Union
32 Grand Street
Hartford, Conn. 06106

Martin Margulies
University of
Bridgeport School
of Law
303 University Ave.
Bridgeport, Conn. 06601

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

39 C.F.R. §232.1(h)(1), contained in the Postal Service Manual §221.654, provides in full:

(1) Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited. This prohibition does not apply to:

(i) Commercial activities performed under contract with the Postal Service or pursuant to the provisions of the Randolph-Sheppard Act;

(ii) Posting notices on bulletin boards as authorized in §243.2(a) of this chapter;

(iii) The solicitation of Postal Service and other Federal military and civilian personnel for contributions by recognized agencies as authorized by [the Office of Personnel Management].

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-1610

In the Supreme Court of the United States

OCTOBER TERM, 1992

FRANK LONGO, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DOUGLAS N. LETTER
STEVE FRANK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a United States Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property violates the First Amendment to the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1610

FRANK LONGO, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The January 13, 1992, opinion of the court of appeals (Pet. App. 15A-30A) is reported at 953 F.2d 790. The order of this Court vacating the Second Circuit's January 13, 1992, judgment and remanding the case to the court of appeals for further consideration is set forth at Pet. App. 12A. The December 28, 1992, opinion of the court of appeals on remand (Pet. App. 1A-11A) is reported at 983 F.2d 9. The opinion of the district court (Pet. App. 33A-79A) is reported at 761 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. The petition for a writ of

certiorari was filed on March 29, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, petitioner attempted to run for the United States Senate as an independent candidate from Connecticut. Pet. App. 17A. In order to qualify for a place on the ballot, he was required to collect approximately 9,800 signatures on petitions. On May 25, 1988, petitioner set up a table and chair on the off-street access walkway adjacent to the entrance to the Torrington, Connecticut, Post Office to solicit signatures in support of his candidacy. *Ibid.*

The Torrington Post Office is located on property owned by the United States Postal Service. Pet. App. 36A-37A. The off-street access walkway is a concrete apron surrounding the post office building. It is located entirely on Postal Service property, and it is adjacent to and leads to the entrance of the post office building. It is separated from the municipal sidewalks and streets by a parking lot, driving lanes, and garage space for Postal Service vehicles. *Id.* at 37A. The walkway provides the only means by which customers of the post office can travel from the parking lot to the post office building. *Ibid.*

The Torrington postmaster informed petitioner that his actions violated a Postal Service regulation, 39 C.F.R. 232.1(h)(1), that prohibits "campaigning for election to any public office" on Postal Service property. Pet. App. 17A-18A. The postmaster showed petitioner a copy of the regulation and asked him to leave, but petitioner refused. *Id.* at 18A. When petitioner continued to ignore the postmaster's requests, he was arrested by the Torrington police and charged

with criminal trespass. On July 13, 1988, the charges against petitioner were dropped in exchange for his promise to cease campaign activities at the post office. *Ibid.* Petitioner nevertheless returned on four separate occasions to solicit signatures, each time setting up a table and chair on the access walkway. Several postal patrons complained that petitioner was abusive when they refused to sign his petition or when they questioned him as to his reasons for using Postal Service property. *Ibid.*

2. On August 12, 1988, petitioner filed this action in federal district court seeking declaratory and injunctive relief. Pet. App. 18A. Petitioner alleged that the postal regulation codified at 39 C.F.R. 232.1 (h)(1) was invalid, both facially and as applied, under the First Amendment to the United States Constitution. Pet. App. 18A. In April 1991, the district court granted summary judgment in petitioner's favor. *Id.* at 31A-32A. It held that the off-street access walkway was not a public forum, *id.* at 52A-63A, but that the challenged regulation nevertheless violated the First Amendment because it was content-based and underinclusive. *Id.* at 63A-79A.

3. The court of appeals reversed. Pet. App. 15A-30A. The court declined to determine the walkway's status as a forum for First Amendment purposes. Instead, it found that the postal regulation at issue was a reasonable time, place, and manner restriction that could survive scrutiny even in a traditional public forum. *Id.* at 22a-29a.

4. On October 5, 1992, this Court vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992). Pet. App. 12A.

In *Burson*, the Court found that a Tennessee statute prohibiting solicitation of votes within 100 feet of the entrance to a polling place was a "content-based" restriction in a public forum. The Court nevertheless upheld the restriction as necessary to serve compelling state interests. 112 S. Ct. at 1855. On remand, the court of appeals again reversed the judgment of the district court. The court acknowledged that the restriction on campaigning for public office would appear to qualify as a "content-based" restriction under *Burson*, and declined to hold that the regulation served "a compelling state interest." Pet. App. 5A-6A. The court nevertheless upheld the regulation. Relying on the reasoning of a plurality of the Court in *United States* v. *Kokinda*, 497 U.S. 720 (1990), the court of appeals determined that the postal walkway at issue—which, like the walkway in *Kokinda* was designed solely to provide access to the post office for individuals engaged in postal business—was not a public forum for the purpose of expressive activity. Pet. App. 7A. The court stated that, "[u]pon a finding that an area is a nonpublic forum, the only requirement of the regulation is that it be reasonable and not an effort to suppress a speaker['s] [viewpoint]." *Id.* at 9A. The court reiterated its previous finding that the regulation served a "*significant* state interest in precluding postal workers from political entanglement." *Id.* at 10A (emphasis in original). It thus concluded that the regulation met the "lesser requirement of reasonableness." *Ibid.*

ARGUMENT

1. a. Petitioner argues that the Court should review this case to "provide authoritative guidance" concerning the "forum status" of an off-street postal walkway—that is, whether such a walkway is a traditional or designated public forum for free speech activities, or a nonpublic forum. Pet. 21-22; *id.* at 10-11. There is, however, no conflict among the courts of appeals concerning the forum status of off-street postal walkways such as the one at issue here. Although the Fourth Circuit had held in *Kokinda*, in the course of striking down a regulation prohibiting solicitation on postal property, that a similar off-street walkway was a traditional public forum for First Amendment purposes, that decision was reversed by this Court. 497 U.S. 720 (1990). To be sure, no one view of the forum status of the postal walkway in *Kokinda* garnered the support of a majority of Justices. However, the Court did reverse the only decision in which a court of appeals had held that this type of off-street postal walkway is a traditional public forum, and there is currently no authority in the courts of appeals for that proposition. Indeed, other than the Fourth Circuit in *Kokinda*, no court of appeals has ever struck down Postal Service restrictions on expressive activity on Postal Service property, whether on the ground that the property at issue was a public forum or on any other basis. See *Monterey County Democratic Cent. Comm.* v. *United States Postal Service*, 812 F.2d 1194 (9th Cir. 1987); *United States* v. *Belsky*, 799 F.2d 1485 (11th Cir. 1986); *United States* v. *Bjerke*, 796 F.2d 643 (3d Cir. 1986); *American Postal Workers Union* v. *United States Postal Service*, 764 F.2d 858 (D.C.

Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *National Anti-Drug Coalition, Inc.* v. *Bolger*, 737 F.2d 717 (7th Cir. 1984); *Jacobsen* v. *United States Postal Service*, No. 89-16054 (9th Cir. Apr. 30, 1993).

b. The court of appeals was correct in holding that the postal walkway at issue is not a public forum. See Pet. App. 7A-8A. As the government argued before this Court in *Kokinda*, see Gov't Br. 16-42, an off-street postal walkway with the characteristics of the one at issue here does not qualify as a traditional public forum under accepted principles of forum analysis. The walkway is not a public thoroughfare; it was "constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city." *Kokinda*, 497 U.S. at 728 (plurality opinion). Moreover, contrary to petitioner's suggestion (Pet. 22-27), the court's identification of the postal walkway as a nonpublic forum is fully consistent with more recent decisions of this Court. In *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 112 S. Ct. 2701 (1992), this Court emphasized that the history of the airport terminal that was at issue in that case revealed that the government had not consistently made it available, nor had it been used by the public, for the free exchange of ideas. 112 S. Ct. at 2706-2707. Likewise, in the instant action, off-street post office walkways have not historically been thrown open to the public for the full range of First Amendment activities. See *United States* v. *Kokinda*, 497 U.S. at 727-747. Thus, the walkways do not have the characteristics of a traditional public forum.

Petitioner is mistaken in suggesting (Pet. 14-17) that the Postal Service has created a designated pub-

lic forum because, while it expressly forbids certain categories of speech,[1] individuals or groups have been permitted to leaflet, speak, and picket on postal premises. Even petitioner acknowledges (Pet. 15), however, that "a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activity," *Kokinda*, 497 U.S. at 730 (plurality opinion). As this Court stated in *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), the "government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." See also *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) ("selective access does not transform government property into a public forum"). There has been no intentional designation here: As the plurality in *Kokinda* observed, 497 U.S. at 730, "[n]o postal service regulation opens postal sidewalks to any First Amendment activity" by the public.[2] Thus, the regulations make clear that the

[1] Aside from prohibiting campaigning for public office, the regulation forbids "[s]oliciting * * * contributions, * * * collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises." 39 C.F.R. 232.1(h)(1). See *Kokinda*, 497 U.S. at 724 (plurality opinion). The Postal Service is also authorized to prohibit other activities that "impede[] or disturb[] the general public in transacting business or obtaining the services provided on [postal] property." 39 C.F.R. 232.1(e).

[2] The regulations permit certain non-employees to engage in narrow categories of expression that are closely related to the mission of the Service and its character as a federal

postal walkway has not been made into a forum on which members of the public are invited to campaign for public office.

c. There is no need for this Court to hold this petition pending its decision in *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 959 F.2d 381 (2d Cir.), cert. granted, 113 S. Ct. 51 (1992). See Pet. 22 n.10. Petitioner concedes (Pet. 13) that the issue he urges the Court to decide—whether, with respect to the premises in question, "the government has created a designated forum in the first place"—is "not presented" in *Lamb's Chapel*. Petitioner acknowledges that the school property to which petitioner's religious organization sought access in *Lamb's Chapel* had been "designated" by the government for speech-related activities, because school district regulations implementing state law had expressly made the property available to a wide range of groups for that purpose. See Pet. 13 n.3. The issue in *Lamb's Chapel* thus is not whether school property was "designated" for the exercise of First Amendment rights, but whether religious groups could selectively be excluded from the forum. See 959 F.2d at 387-389. For that reason, the decision in *Lamb's Chapel* is unlikely to have any bearing on the threshold question petitioner wishes this Court to address—whether the off-street postal walkway qualifies as a designated forum in the absence of a postal regulation that explicitly "opens postal side-

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entity, including "[c]ommercial activities performed under contract with the Postal Service," and "solicitation of Postal Service * * * personnel for contributions" to a federally sponsored charity drive. 39 C.F.R. 232.1(h)(1)(i), (ii), and (iii).

walks to * * * First Amendment activity." *Kokinda*, 497 U.S. at 730.

3. Finally, relying principally on the Court's opinion in *International Soc'y for Krishna Consciousness* v. *Lee*, 112 S. Ct. 2701 (1992), petitioner claims (Pet. 28-29) that, even if the Torrington Post Office walkway is a nonpublic forum, the court of appeals erred in finding that it was reasonable to forbid campaigning for public office on the premises. Petitioner's reliance on *Lee* is misplaced.

In that case, in finding a rule banning solicitation in an airport terminal to be reasonable, the Court observed that solicitation was permitted on outdoor terminal sidewalks that were frequented by most of the terminal passengers. That observation does not undermine the reasonableness of the regulation at issue here. Although the Court in *Lee* suggested that the fact that an interminal ban on solicitation would have a minimal effect on the speaker's access to its targeted audience contributed to the reasonableness of the restriction, it did not suggest that a restriction on speech was per se unreasonable unless an equivalent opportunity to reach the same audience was available nearby. Indeed, the Court has stated elsewhere that, to satisfy a test of reasonableness, a limitation on speech in a nonpublic forum "need not be the least restrictive or least intrusive" that can be devised. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989). Rather, it is sufficient that the limitation "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799.

In this case, the Second Circuit previously decided, in the context of a time, place, and manner analysis (see Pet. App. 22A-25A), that the anti-campaigning

regulation was a reasonable means of advancing the important Postal Service interests in avoiding an appearance of improper political involvement and relieving its employees of the burden of overseeing on-premises campaigning. *Id.* at 22A-24A.[3] In *Kokinda*, the Court recognized that even non-partisan solicitation could distract postal personnel from their main task of delivering the mail by requiring them to "field[] competing demands for space and administer[] a program of permits and approvals." 497 U.S. at 735 (plurality opinion). See also *id* at 739 (Kennedy, J. concurring in the judgment) ("the Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions"). In sum, the challenged regulation represents a reasonable means of advancing valid purposes, and is therefore a permissible restriction on speech in a nonpublic forum.[4]

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[3] Petitioner notes (see Pet. 30-31) that, although postal regulations forbid campaigning for public office, they are silent concerning expression on partisan political issues. However, the Postal Service could reasonably decide that the possibility of appearing to favor political candidates posed a greater threat to the Postal Service's professionalism and image of impartiality than permitting citizens to express political opinions on the premises.

[4] Petitioner also claims (Pet. 32-36) that the Postal Service's concern that permitting campaigning on the premises might compromise the appearance of political neutrality is not sufficiently "supported by the record." Contrary to petitioner's assertion (Pet. 32), this Court has never held that there must be "conclusive proof of an actual effect" before a government entity may limit speech on its premises. See *Cornelius*, 473 U.S. at 810. On the contrary, "the Government need not wait until havoc is wreaked to restrict access to a

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DOUGLAS N. LETTER
STEVE FRANK
Attorneys

MAY 1993

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nonpublic forum." *Ibid.* See also *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 52 & n.12 (1983) ("exclusion of [a] rival union may reasonably be considered a means of insuring labor peace within the schools"). Petitioner acknowledges that Congress expressed its desire "to put an end to the politicization of the [Postal Service]" and to minimize the evils of political patronage. Pet. 34. Forbidding on-premises campaigning for public office is a reasonable means of advancing those goals, since it ensures that postal employees will not use access to postal premises to curry favor with candidates, and that successful candidates, in turn, will not reward employees for providing special access.

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In The

Supreme Court of the United States

October Term, 1992

FRANK LONGO,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity
as Postmaster of the Torrington Post Office,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTHA STONE
(Counsel of Record)
Connecticut Civil Liberties
Union Foundation
32 Grand Street
Hartford, CT 06106
(203) 247-9823

MARTIN MARGULIES
University of Bridgeport
School of Law
303 University Avenue
Bridgeport, CT 06601
(203) 576-4121

MATTHEW HOROWITZ
WEISELMAN, HOROWITZ & THAYER
241 Main Street
Hartford, CT 06106-1817
(203) 724-6667

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STATEMENT

Pursuant to Rule 15.7 of the Rules of this Court, Frank Longo respectfully submits this Supplemental Brief in order to discuss the implications of this Court's recent decision in Lamb's Chapel and John Steigerwald v. Center Moriches Union Free School District, 1993 WL 187864 (U.S.) (June 7, 1993).

REASONS FOR GRANTING THE WRIT

The Lamb's Chapel decision underscores the need for plenary review in Longo, for two reasons.

First: in our certiorari petition earlier this year, we identified two distinct prongs to the designated forum issue that the case raises. One was whether a forum has been designated in the first place. The other was whether, once a forum has been designated for the discussion of a wide range of subjects, a selective subject-matter exclusion must

survive strict scrutiny. Lamb's Chapel, we anticipated, might decide the second question, but it would not decide the first.

Lamb's Chapel, however, did not decide the second question either. Though it found "considerable force" in the Chapel's argument (which is also ours) that selective subject-matter exclusions in generally open designated fora are suspect, 1993 WL 187864 at 4, it based its holding on a different ground: that the school board had engaged in impermissible viewpoint discrimination among speakers of the same character. Thus, both of the designated forum questions in Longo remain

unresolved. This Court should grant certiorari and resolve them.[1]

Second: the school district asserted, in Lamb's Chapel, a compelling interest in avoiding an establishment clause violation. In the district's view, the violation would occur because any religious speech on school property -- even occasional religious speech by outsiders in a

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[1] Under an "objective" theory of forum-analysis, the two issues meld. Whether a forum has been opened, and whether, once opened, it may be limited to the discussion of particular subjects, both depend upon how wide a range of speech is already countenanced on the property. According to this view, the Postal Service has opened a forum by at least tacitly allowing a wide range of speech; and, because it allows a wide range of speech, its selective exclusion of partisan campaigning requires extraordinary justification. See United States v. Kokinda, 110 S.Ct. 3115, 3132-3133 (1990) (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting); id. at 3125 (Kennedy, J., concurring in the judgment).

generally open forum -- would, necessarily and in all circumstances, convey the impression that the school was endorsing the religious message. 1993 WL 187864 at 5-6. The Court not only rejected this argument; it intimated that the rule excluding all religious speech might not even survive rational basis review. 1993 WL 187864 at 8, n.6. If that be so, the selective exclusion of all partisan campaigning on postal service property, in order to avoid the appearance that the postal service is endorsing the candidate, should likewise fail rational basis review. This Court should grant certiorari in order to resolve this issue as well.

CONCLUSION

For the reasons set forth in the certiorari petition and in this

Supplemental Brief, the petition should be granted.

Respectfully submitted,

Martha Stone
(Counsel of Record)
Connecticut Civil
Liberties Union
Foundation
32 Grand Street
Hartford, CT 06106
(203) 247-9823

Martin B. Margulies
University of Bridgeport
School of Law
303 University Avenue
Bridgeport, CT 06601
(203) 576-4121

Matthew Horowitz
Weiselman, Horowitz
& Thayer
241 Main Street
Hartford, CT 06106-1817
(203) 724-6667